90-1044 (1)

No.—

Supreme Court, U.S.
FILED
JAN 2 1990
JOSEPH F. SPANIOL, JR.
CLERK

In The
Supreme Court of the United States
OCTOBER TERM, 1990

SEWELL PLASTICS, INC.,
Petitioner,
v.

THE COCA-COLA COMPANY (doing business through its division, COCA-COLA USA); SOUTHEASTERN CONTAINER, INC.; ABERDEEN COCA-COLA BOTTLING CO., INC.; ALABAMA COCA-COLA BOTTLING COMPANY; BISCOE COCA-COLA BOTTLING COMPANY, INC.; CAROLINA COCA-COLA BOTTLING CO., INC.; COCA-COLA BOTTLING COMPANY CONSOLIDATED; COCA-COLA BOTTLING COMPANY OF ANDERSON, SOUTH CAROLINA, INC.; COCA-COLA BOTTLING COMPANY OF ASHEVILLE, N.C.; COCA-COLA BOTTLING COMPANY OF MOBILE; COCA-COLA BOTTLING COMPANY

(Caption Continued on Inside Cover)

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

PETITION FOR A WRIT OF CERTIORARI

WILLIAM L. RIKARD, ESQ.
PARKER, POE, THOMPSON, GAGE & PRESTON
2600 Charlotte Plaza
Charlotte, NC 28244
(704) 372-9000

ROBERT L. HOEGLE, ESQ.
Counsel of Record
PETER ARON, ESQ.
OLWINE, CONNELLY, CHASE, O'DONNELL & WEYHER
299 Park Avenue
New York, New York 10171
(212) 207-1800

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

of Nashville, Inc.; Coca-Cola Bottling Company of Roanoke, Inc.; Coca-Cola Bottling Company of Wilson, Inc.; Coca-Cola Bottling Company United, Inc.; Coca-Cola Bottling Works of Tullahoma, Inc.; Columbia Coca-Cola Bottling Company; Columbus Coca-Cola Bottling Company; Dorchester Coca-Cola Bottling Company; Durham Coca-Cola Bottling Company, Inc.; Eastern Carolina Coca-Cola Bottling Company, Inc.; Fayetteville Coca-Cola Bottling Company; Hampton Bottling Works, Inc.; Lincolnton Coca-Cola Bottling Co., Inc.; Mid South Coca-Cola Bottling Company; Orangeburg Coca-Cola Bottling Co., Inc.; Plymouth Coca-Cola Bottling Co., Inc.; Rock Hill Coca-Cola Bottling Co.; Roddy Manufacturing Company; Sanford Coca-Cola Bottling Company; Tarboro Coca-Cola Bottling Company, Inc.; The Atlanta Coca-Cola Bottling Company; The Coastal Coca-Cola Bottling Company; The Coca-Cola Bottling Company of Henderson, Inc.; The Coca-Cola Bottling Company of Johnson City, Tennessee; and Wilmington Coca-Cola Bottling Works, Inc.,

Respondents.

QUESTION PRESENTED FOR REVIEW

This Petition presents a fundamental antitrust question on joint *buying* conduct, which respectfully would call upon this Court to determine whether buyers are subject to the same antitrust proscriptions against horizontal price-fixing and boycott agreements as sellers:

> Under Sherman Act § 1 (and corollary Clayton Act § 3 principles), is it permissible for a joint buying agreement to require that each participant deal exclusively with one designated supplier and pay the price fixed by the group, excluding all other suppliers from competing for individual participants' business?

This question subsumes a number of closely related issues on joint buying conduct, similarly turning on whether the ground rules are the same for buyers and sellers:

a. Do *per se* rules apply?

b. Do resulting lower prices evidence *anti*-competitive or *pro*-competitive effects?

c. Is "market power" a prerequisite for *per se* or Rule of Reason liability, and if so, is it satisfied where a group of over two dozen buyers, which come to represent nearly *40%* of the relevant buying market, agree that the group may set—and hence has the power to raise or lower—the price each must pay?

d. Does a supplier suffer "antitrust injury" where it loses profits as a result of an exclusive dealing and price-fixing agreement between a competing supplier and a group of customers?

e. Where a horizontal agreement *on its face* has anti-competitive provisions, may the district court nonetheless find—as a matter of law—that the agreement has no anti-competitive effects and is reasonable, and therefore on summary judgment, dismiss Sherman Act § 1 and Clayton Act § 3 claims challenging it?

LIST OF PARTIES

The parties are identified in the caption. Petitioner Sewell Plastics, Inc. is a subsidiary of Constar International, Inc. and has no non-wholly owned subsidiaries.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

No. ——

SEWELL PLASTICS, INC.,

Petitioner,

v.

THE COCA-COLA COMPANY (doing business through its division, COCA-COLA USA); SOUTHEASTERN CONTAINER, INC.; ABERDEEN COCA-COLA BOTTLING CO., INC.; ALABAMA COCA-COLA BOTTLING COMPANY; BISCOE COCA-COLA BOTTLING COMPANY, INC.; CAROLINA COCA-COLA BOTTLING CO., INC.; COCA-COLA BOTTLING COMPANY CONSOLIDATED; COCA-COLA BOTTLING COMPANY OF ANDERSON, SOUTH CAROLINA, INC.; COCA-COLA BOTTLING COMPANY OF ASHEVILLE, N.C.; COCA-COLA BOTTLING COMPANY OF MOBILE; COCA-COLA BOTTLING COMPANY OF NASHVILLE, INC.; COCA-COLA BOTTLING COMPANY OF ROANOKE, INC.; COCA-COLA BOTTLING COMPANY OF WILSON, INC.; COCA-COLA BOTTLING COMPANY UNITED, INC.; COCA-COLA BOTTLING WORKS OF TULLAHOMA, INC.; COLUMBIA COCA-COLA BOTTLING COMPANY; COLUMBUS COCA-COLA BOTTLING COMPANY; DORCHESTER COCA-COLA BOTTLING COMPANY; DURHAM COCA-COLA BOTTLING COMPANY, INC.; EASTERN CAROLINA COCA-COLA BOTTLING COMPANY, INC.; FAYETTEVILLE COCA-COLA BOTTLING COMPANY; HAMPTON BOTTLING WORKS, INC.; LINCOLNTON COCA-COLA BOTTLING CO., INC.; MID SOUTH COCA-COLA BOTTLING COMPANY; ORANGEBURG COCA-COLA BOTTLING CO., INC.; PLYMOUTH COCA-COLA BOTTLING CO., INC.; ROCK HILL COCA-COLA BOTTLING CO.; RODDY MANUFACTURING COMPANY; SAN-

FORD COCA-COLA BOTTLING COMPANY; TARBORO COCA-COLA BOTTLING COMPANY, INC.; THE ATLANTA COCA-COLA BOTTLING COMPANY; THE COASTAL COCA-COLA BOTTLING COMPANY; THE COCA-COLA BOTTLING COMPANY OF HENDERSON, INC.; THE COCA-COLA BOTTLING COMPANY OF JOHNSON CITY, TENNESSEE; and WILMINGTON COCA-COLA BOTTLING WORKS, INC.,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The district court's opinion granting summary judgment to defendants (respondents herein) on Petitioner Sewell Plastics, Inc.'s ("Sewell's") *per se* claims is published as *Sewell Plastics, Inc. v. The Coca-Cola Co.*, 720 F. Supp. 1186 (W.D.N.C. 1988). The district court's opinion granting summary judgment to defendants on Sewell's remaining claims is published as *Sewell Plastics, Inc. v. The Coca-Cola Co.*, 720 F. Supp. 1196 (W.D.N.C. 1989). The *per curiam* opinion, filed September 4, 1990, by the Fourth Circuit Court of Appeals affirming the district court's opinions is unpublished. The district court's order, filed March 3, 1989, excluding evidence of federal price-fixing convictions of certain defendant bottlers is also unpublished.

JURISDICTION

The unpublished *per curiam* opinion of the Court of Appeals for the Fourth Circuit was entered on September 4, 1990. (App. 1a.)* A timely Petition for Rehearing

---

* "App." refers to the Appendix hereto. "Record" herein refers to the Joint Appendix submitted on the Fourth Circuit appeal.

and Suggestion for Rehearing In Banc was filed, which was denied on October 2, 1990. (App. 9a.) This Court has jurisdiction to review the judgment below by writ of certiorari pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Sherman Act § 1, 15 U.S.C. § 1, provides in pertinent part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. . . .

Clayton Act § 3, 15 U.S.C. § 14, provides in pertinent part:

> It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities . . . on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale on such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

Clayton Act § 4, 15 U.S.C. § 15(a), provides in pertinent part:

> [A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . . and shall recover threefold the damages by him sustained . . . .

Rule 56(c) of the Federal Rules of Civil Procedure provides in pertinent part:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interroga-

tories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

STATEMENT OF THE CASE

A supplier is prevented from competing for the business of more than two dozen former customers because they have jointly agreed to form their own "cooperative" supplier, from which each agrees to buy almost all of its requirements (at least 80%) for the next five years. Each also agrees to pay the uniform price set by the group, regardless of whether a competing supplier offers a significantly lower price. Consequently, no single independent supplier can compete for this business, regardless of price or other consideration. The cooperative creates—in the words of its own management—a "high volume *captive* market," which in fact comes to foreclose from competition nearly 40% of the relevant market.

The excluded supplier charged that the joint buying agreement, *inter alia*, violates Sherman Act § 1 and Clayton Act § 3. On summary judgment, the district court initially dismissed the supplier's *per se* claims and directed that the remaining claims proceed to trial for jury determination under the Rule of Reason. On the eve of trial, the district court *sua sponte* reconsidered its prior ruling made 10 months' earlier, and on the first day of trial granted respondents' oral motion dismissing all remaining claims. The Fourth Circuit Court of Appeals affirmed.

Dismissal of the supplier's claims as a matter of law means that buyers are no longer subject to Sherman Act § 1 and Clayton § 3 proscriptions against concerted conduct, including price-fixing and boycott activities. This case, therefore, presents occasion for considering and determining whether, and to what extent, the antitrust laws apply evenly to buyers and sellers alike.

The Facts

The Parties

Sewell makes plastic beverage bottles for sale to soft drink bottlers. It was one of the first suppliers upon the industry's inception in 1977 and now sells bottles throughout most of the country. For several years before the challenged joint buying agreement was put in place, Sewell was the principal supplier to the respondent bottling companies, supplying the vast majority of their needs. (App. 31a-33a.)

Respondent The Coca-Cola Company is, of course, the well known soft drink company, making and selling syrup and related products to its franchised bottlers, including the respondent Coca-Cola bottlers, all of which are located in the southeastern United States. They sell Coca-Cola and certain other brands to retailers located within their exclusive territorial franchises. (App. 15a.)[1]

Respondent Southeastern Container, Inc. ("Southeastern") is a "cooperative" manufacturer of plastic bottles located in Asheville, North Carolina. (App. 15a.)[2] It was formed in 1982 by over two dozen of the respondent bottlers, with others joining since then. Each is a stockholder of Southeastern. Separately, the bottlers also jointly agreed that each would enter into an identical five-year requirements contract to buy from Southeastern, in effect making all of them captive customers of Southeastern. (App. 36a.)

---

[1] The Soft Drink Interbrand Competition Act of 1980, 15 U.S.C. §§ 3501-3503, expressly provides for the enforceability of soft drink exclusive territorial franchises where substantial interbrand competition exists, thereby exempting those agreements from antitrust attack. The Act also expressly provides that no other antitrust exemption is afforded. 15 U.S.C. § 3502.

[2] The cooperative was not formed under any legislation authorizing particular cooperatives (as, for example, agricultural cooperatives authorized by The Capper-Volstead Act, 7 U.S.C. § 291 (1980)).

The form of the bottlers' joint venture itself, of course, provides no antitrust exemption or immunity for concerted conduct.

The Industry

The relevant market is the purchase and sale of plastic soft drink beverage bottles in a six-state area within the southeastern United States. (App. 30a.) From inception of the industry in 1977 until the joint buying agreement was implemented in 1982, there was increasing competition among several suppliers—including Sewell—for individual bottlers' business. Although bottlers typically signed supply contracts until at least the early 1980's, competition among suppliers was ongoing because the contracts almost always contained "price competition" clauses, permitting a bottler to buy elsewhere if its existing supplier did not meet a lower price offer. (Record 1972-75, 1987-90, 2028-57.) Suppliers also provided different services and related products—such as labels and package types—to satisfy individual bottler needs. (Record 1954, 1956, 1960, 1977-78; *see, e.g.*, 3462-63, 3471-72, 3482-83, 3903, 3910.)

By the early 1980's, competition among suppliers was very real, as the number of suppliers increased and the industry experienced oversupply. Industry prices generally began to decline by about mid-1980. By 1982, the industry was known to have excess capacity, and price competition continued to intensify. (App. 34a; Record 1908, 2178-79, 2497-98, 3893-4869.)[3]

Despite vigorous competition, Sewell continued to win most competitive battles, at least as to the respondent Coca-Cola bottlers, obtaining the vast majority of their business. (App. 32a-34a.)

---

[3] Notably, one of the competitors in the southeastern area was a Pepsi bottler "cooperative," "Carolina Canners," formed in the late 1970's and located in Cheraw, South Carolina. Although a cooperative, it sold bottles in competition with other suppliers—without need or benefit of the kind of joint buying agreement at issue here. Nonetheless, it has remained a viable supplier. (Record 1891, 1970-71, 1986, 3902, 4042.)

The Joint Buying Agreement

In 1982, a group of respondent bottlers sought to negotiate lower prices with suppliers by joining together to use their combined economic power. Dissatisfied, and with the encouragement and assistance of The Coca-Cola Company, they turned to the formation of Southeastern.

Evidently modeled after another Coca-Cola bottler cooperative located elsewhere (in Texas), Southeastern was formed only after the original 26-bottler group agreed in advance—*i.e.*, before Southeastern made its first bottle—that each would enter into a mandatory long-term supply contract. They jointly agreed that for a *five-year period*:

—each would buy at least 80% of its requirements from Southeastern;

—each would take the type of bottle ("1-piece") chosen collectively by the group (despite historically buying the other "2-piece" type);

—Southeastern would not have to provide related products (*e.g.*, labels) which independent suppliers offered in a freely competitive market; and

—each would buy at whatever price Southeastern's board of directors determined. (App. 36a-37a; Record 2573-74, 3112-16, 3334-35.)

The contract also included a "price competition" clause that was anything but that: for the first year, each bottler had to buy at the price set by the Southeastern board; thereafter, in order to buy from another supplier a bottler had to show that the average price of *two* independent suppliers was lower than Southeastern's, whereupon Southeastern still had 90 days to meet the average (*i.e.*, not even the lowest) price. *The consultant to Southeastern admitted that this was intended to prevent a single competitor from offering lower prices.* It was effective in doing so. (App. 38a.)

Even years *after* start-up, the same provisions were used in jointly agreed-upon supply contracts for subsequent products (new bottle sizes) made by Southeastern. (Record 3730-46.)

Market Effects

The most direct and obvious effect of the joint buying agreement was the removal of the Coca-Cola bottlers from the competitive market—where previously there had been vigorous competition for the respondent bottlers' business, there came to be none. (Record 2159, 2830, 2854, 3337-38, 3412-15, 5990.) Independent suppliers, like Sewell, were unable to compete for the vast majority of the bottlers' business, regardless of price. They had the opportunity to supply only when, for whatever reason, Southeastern was unable to meet bottler needs. Independent suppliers were thus forced to re-examine their commitment to the business, prompting them, for example, to curtail operations and to reduce research and development activities; and two suppliers decided to sell their operations and get out of the business. (App. 44a, 49a; Record 1955-57, 2061-65, 2273, 2306, 3578, 6810.)

After the joint buying agreement was put in place, bottle prices generally continued to decline. By its nature, the agreement would contribute to declining prices in two respects:

—it relegated existing suppliers to a much smaller market segment in which to compete, further intensifying price competition among them in that remaining competitive segment; and

—Southeastern itself, assured of a captive market and also not required to supply the complete mix of products and services offered by independent suppliers, could maximize its own efficiencies and hence offer lower prices.

Still, there was evidence that three bottlers sought to withdraw from the agreement. (*See* App. 37a-38a.) One was a relatively small bottler (Anderson) who in 1983

had been offered a *lower* price by Sewell. After being summoned to a Southeastern board of directors' meeting at which its obligations to the group were made unmistakably clear, it remained. The other two were among the larger bottlers. The Asheville bottler had concluded, as an independent consultant's written report stated, that it was losing market share by using the Southeastern-type bottle and should resume buying from independent suppliers. The other large bottler (Coke United) also wanted out, as reflected in handwritten notes of its chief financial officer prepared for a Southeastern board meeting, which stated *"we want out altogether."* (Record 2937-38, 2941, 3612-13, 5631, 5709-11, 5746, 5832-33.)

Those two bottlers were told that if they withdrew, a financial assessment would be imposed by the group which, Southeastern's general manager conceded, significantly exceeded any actual losses it might suffer. (Record 1961-62, 2488-93, 2511-14, 2529, 2966-71, 3289-92, 5702-34, 6098.)[4]

Bottlers required to buy from Southeastern experienced quality problems with their bottles. (App. 45a.) Given the possibility of injury from exploding bottles, one bottler's personnel pleaded for permission to buy from Sewell because Southeastern's bottle was "exploding in our warehouse, on the trucks, in outlets and in people's homes." (Record 3670.) The request was denied. Coca-Cola's field personnel reported to headquarters that Southeastern experienced "a lot of failures, and/or quality problems which seem to be related to the fact that the bottler is almost

---

[4] On summary judgment, the district court interpreted these events as reflecting merely those bottlers' "consideration" of withdrawal, and found that the threatened financial assessment did not represent a penalty but rather "liquidated damages"—although no one testified to that effect and the agreement contained no "liquidated damages" provision. (App. 37a-38a.) In any event, even the district court's characterization shows that the bottlers were influenced by the agreement to refrain from further pursuing their options on the open market.

required to take anything that is delivered." (Record 5003R.)

"A High Volume Captive Market"

The group recognized that Southeastern's commercial "success" resulted directly from the joint buying agreement. In a slide presentation proclaiming Southeastern's success to the participating bottlers, Southeastern management asked, "Why can't merchant suppliers do the same?" The first reason: "They don't have the high volume captive market that Southeastern does with its sales agreements with our owners." (Record 3684-92.)

By the close of discovery in this action, the buying group's total purchasing power represented nearly 40% of the market. (App. 46a.)

Prior Proceedings

The prior proceedings were marked by unusual summary judgment procedures—involving conflicting written opinions; impromptu hearings; dismissal of the case from the bench (the district court remarking that it would have let the jury hear the case if it would only be a 2-3 day trial); and issuance of a lengthy opinion five months later where the district court characterized and weighed all evidence in the movants' favor. On appeal, the Fourth Circuit, in an unpublished *per curiam* opinion, affirmed with little discussion. These prior proceedings compel Sewell to respectfully suggest that *de novo* scrutiny of the evidence and question presented to this Court is especially appropriate now.

Summary Judgment I

Sewell filed its complaint in the Western District of North Carolina on August 4, 1986. The action was brought pursuant to Clayton Act § 4, charging violations of Sherman Act §§ 1 and 2, Clayton Act §§ 3 and 7, and state unfair trade laws. Respondents filed answers, and Southeastern subsequently added a counterclaim for abuse of process, unfair trade practices and interference with contractual relations, all arising either out of the filing

of this suit or Sewell's settlement with one of the respondent bottlers (Wilmington).

After considerable discovery, defendants made an omnibus motion for summary judgment on August 22, 1987. Sewell cross-moved for summary judgment for a declaration that the agreement—in its price-fixing and five-year 80% requirements elements—constituted a *per se* violation.

In his first summary judgment opinion issued on May 6, 1988, the Honorable James B. McMillan denied Sewell's cross-motion and granted respondents' motion dismissing Sewell's *per se* claims for a number of stated reasons, including: the fact that the bottlers were not competitors on the selling side [5]; the fact that the challenged restraints related to their joint production venture; and the fact that the courts were unfamiliar with the arrangement in issue. (App. 78a, 84a-93a.)

On the remaining claims, summary judgment was denied, the court expressly stating, *inter alia*, that there was sufficient evidence of anti-competitive effects to warrant trial under the Rule of Reason. (App. 91a, 93a-94a.) [6]

As the case headed toward trial, four more hearings were held.[7] The sufficiency of Sewell's evidence to pro-

---

[5] The court did observe that *if* the bottlers were competitors on the selling side, a *per se* finding may be warranted. (App. 92a.)

[6] The district court granted respondents' application for leave to file an interlocutory appeal from denial of summary judgment, which the Fourth Circuit denied. (App. 103a, 101a.)

[7] In the last hearing, the court ruled inadmissible Sewell's proffered evidence of two federal criminal price-fixing convictions, arising out of retail price-fixing by two defendant bottlers (who represented roughly 30% of the original buying group's purchases.) This was proferred to show that (a) there did not exist the supposedly vigorous interbrand competition between the Coca-Cola bottlers and their competitors which respondents had asserted as a motivation for entering into the agreement; (b) the Asheville bottler (whose two officers were convicted) was losing market share by using the type of bottle disfavored by consumers, and *not* because of any price competition from competing soft drink bottlers, as it

ceed to trial, as previously determined on summary judgment, was not questioned by the court in any of the hearings.

Summary Judgment II

In March 1989, within a week of the scheduled six-week jury trial, the district court issued a one-day notice for *sua sponte* reconsideration of the summary judgment motion denied in its opinion of 10 months earlier. The motion was denied without prejudice to renewal. It was again reheard impromptu after jury selection the following day and denied without prejudice, the court indicating that it intended to rehear it again following the second day of trial. On the first day of trial, the motion was made orally after opening statements and granted following the luncheon recess. (App. 106a-107a.)

In dismissing Sewell's claims from the bench, the court relied almost exclusively on the fact that bottle prices had declined since the joint buying agreement was implemented, which the court held could "only" have resulted from the joint buying agreement and which undoubtedly benefitted consumers. It remarked that if the case could have been tried in 2 or 3 days, the court would have let the jury decide it. (App. 107a.) The court indicated that it intended to make a number of additional findings, directing respondents to submit "proposed" findings and Sewell to respond. (App. 106a-107a.)

Five months later, on August 25, 1989, the court issued its lengthy opinion. (App. 11a.) After disposing of Sewell's argument that an unfair summary judgment

---

had asserted; and (c) there was an absence of the substantial interbrand competition which is a prerequisite for the antitrust exemption conferred by The Soft Drink Interbrand Competition Act of 1980.

The evidence was ruled inadmissible (on stated grounds that it involved only two defendants and would tend to prejudice the rest) and consequently was not considered later on reconsideration of summary judgment. (App. 98a.)

procedure was imposed on the eve of trial, the court reiterated the correctness of its prior dismissal. It relied on general industry price decline and output increase as confirming the absence of substantial anti-competitive effects. The court also ostensibly addressed other evidence of anti-competitive effects proffered by Sewell, systematically rejecting it as either irrelevant or insufficient, and otherwise disregarded Sewell's evidence entirely. To illustrate:

—on injury to the competitive process, the opinion disregards the most elemental fact that where once ongoing competition existed in 100% of the market, a significant portion (reaching nearly 40%) had been entirely foreclosed;

—injury to individual competitors (such as plant closings) was rejected as not evidencing "injury to competition" (App. 44a, 56a-57a);

—as to reduction of consumer choice, the consumers' acknowledged preference for the type of bottle made by independent suppliers was held insufficient because the consumers still purchased Coca-Cola products in the disfavored packages (App. 45a)[8];

—the severe quality problems suffered by Southeastern customers were held insufficient even to raise an issue of whether "overall" quality had deteriorated (App. 45a);

—cutbacks in research and development by some suppliers were held insufficient to raise an issue of

---

[8] The court evidently gave no weight to the consultant's report for Asheville, which concluded that Asheville's customers were buying less *because* it was using the type of bottle required under the joint buying agreement. (Record 5631.) The consumer in any event *had no choice* if he wanted to drink Coca-Cola products, since he could *only* obtain his product through the *exclusive* franchisee, which was using the disfavored package.

whether "overall" industry research and development declined (App. 44a); and

—foreclosure of nearly 40% of the market did not raise an issue of "market power," nor did the contractual right of the group to raise or lower prices to its bottlers (which they *must* pay). (App. 46a.)

No weight was accorded to four affidavits explaining how *other* suppliers (*i.e.*, not just Sewell) were unable to compete. The group's own admission that it possessed a "high volume captive market" which was responsible for its success, also was not addressed.

The district court also went on to hold that, even if there were anti-competitive effects, the challenged restraints were "reasonable" as a matter of law, outweighing any anti-competitive effects. As a matter of law, it was "reasonable" to employ such provisions to preclude an independent supplier from soliciting away one or more bottlers through lower price offers as that would "disrupt" Southeastern's operation.[9] As a matter of law, it was also "reasonable" to mandate a large volume commitment despite acknowledged evidence that far less volume was required to establish a viable manufacturing capability. (App. 58a-62a.)

The district court also held that Sewell had not suffered "antitrust injury" because it was really complaining about lost profits from competition from Southeastern and so its claims are barred under this Court's decision in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977). (App. 63a-66a.)

The Fourth Circuit Court of Appeals affirmed, expressly approving the reasoning of the district court. (App. 1a.) Sewell's Petition For Rehearing and Suggestion for Rehearing In Banc was denied on October 2, 1990. (App. 9a.)

---

[9] Sewell respectfully submits that one man's "disruption" is another man's competition.

WHY CERTIORARI SHOULD BE GRANTED

Buyers and Sellers Alike Need to Know What the Antitrust Rules for Concerted Conduct Are, and Whether the Rules Are the Same for Both.

Joint buying arrangements are commonplace in many industries, including, for example, through purchasing cooperatives, as this Court acknowledged in *Northwest Wholesale Stationers, Inc. v. Pacific Stationery and Printing Co.*, 472 U.S. 284 (1985). Typically the arrangement offers a voluntary alternative way for buyer and seller to do business, without eliminating or restricting the rights of buyers and sellers to do business individually. This case calls into question whether such arrangements may expressly exclude competition—through horizontal boycott (*i.e.*, exclusive dealing) and price-fixing agreement—in the name of seeking lower prices or other perceived benefits to the buyers. Stated bluntly, may buyers do to sellers, what sellers cannot do to buyers?

Antitrust proscriptions against concerted *seller* price-fixing and boycott activities seem firmly established. *Palmer v. BRG of Georgia, Inc.*, 111 S. Ct. 401 (November 26, 1990); *FTC v. Superior Court Trial Lawyers Ass'n*, 110 S. Ct. 768 (January 22, 1990). Under the Fourth Circuit's ruling here, however, the same proscriptions do not apply to *buyers;* or at a minimum, whether they do (and if so, how) is uncertain and confusing.

This Petition, therefore, should be granted to make clear whether the antitrust laws still apply to buyers as they do to sellers. More than 30 years have passed since this Court last condemned buyer price-fixing as *per se* unlawful, *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219 (1948), and pronounced that *any* concerted refusal by "traders to deal with other traders" likewise is *per se* unlawful. *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 212 (1959). Less than two months ago, in *Palmer, supra*, this Court—hold-

ing unlawful sellers' market division—reiterated the blanket condemnation of *all* price-fixing agreements, relying on *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940), in which a *buying* program was held unlawful.

Yet it now seems—at least by virtue of the Fourth Circuit ruling here—that joint buyer conduct ostensibly intended to achieve lower prices, a usually desirable goal, is excused from basic antitrust principles. If so, then the antitrust laws would favor buyers over sellers, and no longer encourage the "give and take" of the marketplace. *FTC v. Indiana Federation of Dentists*, 476 U.S. 447, 459 (1986). Sellers would be deprived of the antitrust protection which is afforded to buyers.

Determining the extent to which the same antitrust proscriptions apply to buyers and sellers is important not only to buyers who may engage or consider participating in joint buying conduct. It is of equal importance to the seller, like Sewell, who may have to confront it. In fact, this case illustrates exactly why the antitrust rules for joint buying conduct should be clearly defined.

Making and selling plastic beverage bottles for soft drink bottlers is the lifeblood of Sewell's business, and has been since inception of the business over 13 years ago. Sewell sells to bottlers throughout the country, which means Coca-Cola and Pepsi bottlers are critical to its business.

If the Southeastern-type arrangement is judicially condoned, then Sewell (and other independent suppliers) face the risk that concentrated groups of Pepsi and Coca-Cola bottlers can set up the same arrangement, removing *en masse* a large group of customers in a given area. In areas where *both* Pepsi and Coca-Cola bottlers would do so, an independent supplier could not conceivably survive, as the remaining bottlers of the lesser known soft drink brands hardly have sufficient business to support bottle-making plants. There would be nothing to stop Pepsi and Coca-Cola bottler groups from systematically imple-

menting such arrangements to eliminate independent suppliers throughout the country (and as an additional significant consequence—which would be an incentive for the two soft drink giants—bottlers of lesser known brands would have nowhere to turn for bottles).

On summary judgment, Sewell submitted an affidavit from the former head of another independent supplier relating how that supplier determined to get out of the business because he was told by a senior Coca-Cola executive that it intended to promote and implement the strategy of so-called "self-manufacture" by its bottlers through arrangements like the one in issue. (Record 2058-65.)[10]

Sewell and the remaining independent suppliers need to know if they face the risk of being excluded from soliciting the business of concentrated groups of bottlers of the two soft drink giants.

Even if no further exclusionary buying arrangements would be established, the rules of competition in any event should be firmly defined. There already exist eleven cooperatives of one kind or another in the Coca-Cola system, including three which make plastic bottles. (Record 1871.) In the relevant area here, Pepsi bottlers have their cooperative, "Carolina Canners," *supra* at n.3, but it has operated *without* the advantages enjoyed by Southeastern under its captive arrangement. Independent suppliers can and do compete against Carolina Canners for the business of Pepsi bottlers; no one can compete for the business of the Coca-Cola bottlers.

The rules of competition should be the same for all competitors, "cooperatives" and others alike. This Court

---

[10] This supplier was not alone in deciding to get out of the business. Similar reasons prompted a second supplier to do the same, as also reflected in an affidavit submitted on summary judgment. (Record 1952-58.)

has so held, *even* when considering the conduct of a cooperative formed under special Congressional legislation; being a "cooperative" is not license to engage in business practices, unavailable to independent firms, which do not promote competition but rather discourage or eliminate it. *Maryland & Virginia Milk Producers Ass'n v. United States*, 362 U.S. 458 (1960).

* * *

We turn now to what we respectfully submit are the key issues which this Court should address in considering the antitrust rules for joint buying conduct, whether such conduct occurs in the context of a "cooperative" or otherwise.

I. THIS COURT SHOULD CONSIDER AND INSTRUCT WHETHER TRADITIONAL PER SE PRINCIPLES APPLY TO A JOINT BUYING AGREEMENT HAVING PRICE-FIXING AND BOYCOTT ELEMENTS.

The *per se* rules for joint seller conduct were unmistakably reaffirmed this year in *FTC v. Superior Court Trial Lawyers Association*, 110 S. Ct. 768 (January 22, 1990), and in *Palmer v. BRG of Georgia, Inc.*, 111 S. Ct. 401 (November 26, 1990). In light of the Fourth Circuit's determination here that the same principles do *not* apply to joint buyer conduct, it is appropriate and important for this Court to instruct whether that is the case.

More than two dozen bottlers agreed that each would deal almost exclusively with Southeastern and pay the price determined by its board of directors. On their face, these are price-fixing and boycott elements which deny other suppliers "access" to the bottlers as potential customers. *Northwest Wholesale Stationers, Inc. v. Pacific Stationery and Printing Co.*, 472 U.S. 284, 294-95 (1985). Sewell's *per se* claims were dismissed as a matter of law on stated grounds which are incorrect, and should be corrected by this Court to assure that *per se* principles are even-handedly applied to buyers and sellers.

A. The "Substantial Competitor" Defense Does Not and Should Not Exist, for the Effect of Joint Buyer Price-Fixing and Boycott Conduct Is the *Same* on *Sellers Regardless* of Whether the Buyers are "Substantial Competitors" on the Selling Side.

Respondents successfully argued to the courts below that *per se* principles were inapplicable to their agreement because they were not "substantial competitors" of each other in selling soft drinks to their customers.[11] The courts below found persuasive reasoning that, because they were not substantial competitors of each other, their agreement posed little or no risk to *inter*brand competition between them and other competing soft drink bottlers.

First, the fact that the bottlers do not compete as sellers, does not alter their status as competitors in the *purchase* of goods. *Nothing in the antitrust laws excludes competition in the purchase of goods in defining proscribed conduct.* In its first summary judgment opinion, the district court even acknowledged that the bottlers were competing *purchasers.* (App. 82a, 88a.)

This Court has not imposed a "substantial competitor" requirement, and the absence of any such determination or analysis in its *per se* rulings suggests otherwise. For example, in *FTC v. Superior Court Trial Lawyers As-*

---

[11] They admitted that there was competition in some limited respects, such as in filling soft drinks for bottlers of certain other brands. (App. 88a.)

As indicated earlier herein, their status as non-competitors derives from the exclusivity of their Coca-Cola territorial franchise, which is enforceable under the Soft Drink Interbrand Competition Act of 1980. Notably, however, the Act expressly limits the antitrust exemption to the enforceability of those agreements, specifically reaffirming that the antitrust laws otherwise apply to all other conduct.

Sewell submits that, by its express terms, the Act cannot be read to permit concerted conduct which would be unlawful *but for* the bottlers' status as "non-competitors" authorized by legislation which, by its terms, is limited to enforcing the exclusive territorial franchise agreement.

sociation, 110 S. Ct. 768 (January 22, 1990), there is no "substantial competitor" relationship among the conspiring trial lawyers.

Second, with due recognition of the antitrust emphasis on *inter*brand competition, the lower courts' refusal to apply *per se* treatment because interbrand competition *among soft drink bottlers of different brands* was not likely affected looks in the wrong direction: It is interbrand competition *among plastic bottle manufacturers* that is directly and intentionally lessened or eliminated. In focusing on the effects at the bottler retail level, the lower courts here disregard the teaching of *United States v. Topco Associates, Inc.*, 405 U.S. 596, 609-10 (1972):

> Our inability to weigh, in any meaningful sense, destruction of competition in one sector of the economy against promotion of competition in another sector is one important reason we have formulated *per se* rules.

The *Topco* decision was recently cited with approval in *Palmer, supra.*

To impose an elusive "substantial competitor" requirement would lead to unpredictable and inconsistent treatments of *per se* principles to concerted conduct which has the same intent and effect: In this case, the effect on Sewell and other independent suppliers is the same *regardless* of the degree of retail competition among defendant bottlers; whether competition at the seller level is unreasonably restrained or substantially lessened *has nothing to do with* the buyers' relationship as retail competitors *vel non* of each other.

B. This Court Should Consider and Instruct Whether the "Ancillary Restraint Doctrine" Excuses a Joint Buying Agreement from *Per Se* Treatment (or Makes It Reasonable, as a Matter of Law, Under the Rule of Reason) Where Its Purpose and Effect Is to Insulate the Buyers' Separate Joint Venture *From* Competition.

Restraints which are necessary to the legitimate objectives of a joint venture are not considered "unreasonable"

for Sherman Act § 1 purposes. *E.g., Broadcast Music, Inc. v. Columbia Broadcasting Sys., Inc.,* 441 U.S. 1, 22 (1979).

In its first summary judgment opinion and in subsequently holding the joint buying agreement reasonable as a matter of law, the district court (approved by the Fourth Circuit) accepted respondents' stated "justification" for the price-fixing and boycott elements of the agreement—namely, that those were necessary to form and successfully operate Southeastern. The district court reasoned that some minimum volume requirement was necessary to establish a viable bottlemaking facility, and so requirements contracts intended to assure such a volume were reasonable. (App. 36a.) The district court further reasoned that the price-fixing and boycott elements also served to preclude other suppliers from "cherry-picking" its bottlers through selective lower price offers. (App. 39a, 92a-93a.) In short, the provisions helped guarantee the "success" of Southeastern.

This holding confuses restraints necessary to the business of the venture itself, with restraints convenient or desirable to give the venture a commercial advantage in the market. The narrow exception for acceptable restraints was suggested by this Court in *Broadcast Music,* 441 U.S. at 23:

> Joint ventures and other cooperative arrangements are also not usually unlawful, at least not as price-fixing schemes, *where the agreement or price is necessary to market the product at all.* (emphasis added.)

Restraints which are designed to prevent independent suppliers from attempting to solicit the business of individual participants, and which thereby insulate the joint venture from competition, are not necessary to "market the product at all." In this case, the joint buying agreement was no more necessary to the making and selling of plastic bottles by Southeastern, than any joint buying agreement with other groups of bottlers is nec-

essary to the making and selling of plastic bottles by any independent supplier. It simply is not.

Of course, a manufacturer may properly determine to negotiate and enter into a contract with a customer. That is a common practice in any business where buyers regularly purchase from the same sellers. However, individual buyer-seller relationships are not at issue; a *horizontal* arrangement among buyers to assure that none of the group is vulnerable to a competing supplier's solicitation *is* in issue.

With all respect, the lower courts thus have confused both necessary and convenient restraints, as well as the distinction between individual buyer-seller relationships and concerted buyer conduct. Indeed, the bottlers' standard supply contract recites that Southeastern needed to be "assured of a ready market" in order to succeed. (Record 5635.) "Success" achieved by "assuring" a captive market is not "success" protected by the antitrust laws.

The rulings here, if permitted to stand, would turn the idea of competition on its head, and encourage anti-competitive horizontal restraints because they happen to make it easier for the participants to achieve "success" not *through* competition, but from the *absence* of it.

II. THIS COURT SHOULD CONSIDER AND INSTRUCT WHETHER, IN A JOINT BUYER CASE, LOWER PRICES REPRESENT PRO-COMPETITIVE OR ANTI-COMPETITIVE EFFECTS.

Equally in issue is what meaning should be given to lower prices in a concerted buyer case. The lower courts' determination that such effects are pro-competitive underlie all of the rationale for dismissal of Sewell's claims.

The lower courts have misapprehended this Court's enunciation of the standard for anti-competitive effects by inappropriately relying on cases which dealt with seller conduct. *E.g., NCAA v. Board of Regents*, 468 U.S. 85 (1984). (App. 90a-91a.)

It certainly would be anomalous to condemn classic buyer price-fixing intended to drive prices down as *per se* unlawful—*e.g., Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219 (1948)—but should *per se* treatment be held inapplicable, then find the very same objective or effect to be *pro*-competitive under the Rule of Reason. Indeed, to find lower prices to be *necessarily pro-competitive*—as happened here—would be to excuse virtually all joint buyer conduct from Rule of Reason application.

If it is the interpretation of this Court that Sherman Act § 1 and Clayton Act § 3 proscriptions should not apply to joint buyer conduct which has the intent or effect of lowering prices, then we urge that this Court do so directly, and not through lower courts' interpretation of this Court's pronouncements in concerted seller cases.

This Court, however, should conclude and pronounce that, just as higher prices represent anti-competitive effects in seller cases, lower prices represent anti-competitive effects in joint buyer cases. This is the *only* result which would maintain even-handed application of the antitrust laws to buyers and sellers. If buyers are allowed to do for themselves what sellers cannot, the competitive balance would be unfairly tipped in buyers' favor and the antitrust laws unevenly applied.

III. THIS COURT SHOULD CONSIDER AND INSTRUCT ON THE MARKET POWER REQUIREMENT FOR PER SE AND RULE OF REASON PURPOSES.

In *FTC v. Superior Court Trial Lawyers Association*, 110 S. Ct. 768 (January 22, 1990), the majority of this Court indicated that market power was not a prerequisite for *per se* condemnation of a seller boycott, but that in any event—without any complex economic analysis—the conspiring trial lawyers' group possessed whatever market power arguably could be required. Nor did this Court in *Palmer v. BRG of Georgia, Inc.*, 111 S. Ct. 401

(November 26, 1990), require or refer to "market power" in holding unlawful a sellers' market division agreement.

In dismissing Sewell's *per se* claims, the district court implied that the respondents did not possess a sufficiently dominant market position which frequently exists when *per se* violations occur. In dismissing Sewell's remaining claims, the district court expressly found that Sewell had failed even to raise an issue of market power. Despite acknowledged evidence that the bottler group represented nearly 40% of the buying market and had a contractual *right* to set the price which each of the 33 bottlers must pay, the district court held that there was "no evidence" of the group's power to raise or depress prices beyond competitive levels. (App. 45a-49a, 58a.)

The rulings here are at odds with this Court's approach to the question of market power. If the magnitude of the trial lawyers' combined economic power in *Trial Lawyers* was sufficient to apply *per se* treatment without detailed and costly economic analysis, the bottlers' power is equally obvious, at a minimum, to have precluded summary judgment dismissal under the Rule of Reason. *Palmer* suggests no such requirement exists at all for *per se* treatment.

This Court should instruct whether *per se* or Rule of Reason treatment of joint *buying* conduct requires a market power showing. As this case demonstrates, "market power" appears to be an elusive standard which creates a likelihood that the antitrust laws will be unevenly applied because of differing conclusions likely to be reached on the same basic facts and circumstances. Surely, if a near-40% market share, coupled with the express power to control price, are insufficient *even to raise a triable issue*, it becomes difficult to discern what would be sufficient. Buyers and sellers are entitled to know, and the Fourth Circuit's adherence to the district court's decision is both wrong and unenlightening on the market power standard.

IV. THIS COURT SHOULD CONSIDER AND INSTRUCT WHETHER A SELLER SUFFERS "ANTITRUST INJURY" WHERE IT HAS LOST PROFITS BY VIRTUE OF AN AGREEMENT AMONG FORMER CUSTOMERS WHICH EXCLUDES THE SELLER FROM COMPETING FOR INDIVIDUAL CUSTOMERS' BUSINESS.

Consistent with the theme that concerted buyer conduct which is intended to achieve lower prices is pro-competitive, the district court (approved by the Fourth Circuit) held that Sewell suffered no antitrust injury within the meaning of Clayton Act § 4, because Sewell was really complaining about Southeastern's "presence" as a competitor in the market. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977).

By holding that no antitrust injury occurred here, the Fourth Circuit has announced an additional basis for excusing conduct from both *per se* and Rule of Reason application. This holding means that no seller may bring a private antitrust action against a group of buyers who have targeted the seller for boycott. It similarly means that no seller may bring an action for concerted price-fixing activities by a group of buyers, for those activities, too, would be deemed "pro-competitive" in the intent and effect of achieving lower prices and, accordingly, the seller would not suffer "antitrust injury."

In this way, too, the antitrust proscriptions have been eliminated for concerted buyer conduct. It is difficult to conceive of a situation where, under this holding, a seller may maintain an action against buyers under Sherman Act § 1 or Clayton Act § 3.

In considering the extent to which those provisions still apply to joint buyer conduct, this Court should reconfirm that sellers do indeed suffer antitrust injury when they

lose sales (and profits) which they otherwise would have enjoyed if they had been able to compete.[12]

V. THIS COURT SHOULD CONSIDER AND INSTRUCT WHETHER RULE 56 AUTHORIZES SUMMARY JUDGMENT DISMISSAL BASED ON THE DISTRICT COURT'S OWN DETERMINATION THAT THE PRO-COMPETITIVE BENEFITS OF CONCERTED CONDUCT—CONTAINING PRICE-FIXING AND BOYCOTT ELEMENTS—OUTWEIGH ANTICOMPETITIVE EFFECTS.

In *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), this Court articulated the requirements for an evidentiary inference of conspiracy in an antitrust case, an element obviously not in issue in this case.

Instead, however, for purposes of this case the district court (approved by the Fourth Circuit) has interpreted *Matsushita* to authorize it to weigh the evidence on summary judgment, thereby making fact findings such as, for example:

—that the contractual provisions in issue were "reasonable" to achieve the "proper" objective of precluding independent suppliers from competing for the participating bottlers' business (App. 39a, 92a-93a);

—that the evidence that suppliers curtailed operations or determined to withdraw from the industry rep-

---

[12] The evidence in this case especially illustrates how Sewell lost profits directly as a result of the price-fixing and boycott elements of the agreement. In one instance, it offered a lower price to a former customer, who was unable to accept because of its membership in the group. (Record 1389-97, 1961, 5709-11.) In two other instances, former customers reconsidered whether to remain in the group and determined to do so only after the group's representatives advised them that they would have to pay a substantial financial assessment (significantly more than any lost profits) if they withdrew. Both remained. (Record 1961-62, 2488-93, 2511-14, 2529, 2966-71.)

We urge that the direct causal connection between the antitrust violations and Sewell's losses hardly could be more apparent.

resented merely injury to "competitors," as opposed to injury to "competition" (App. 44a, 56a-57a);

—that the acknowledged evidence of quality problems was insufficient to raise a triable issue of whether there was an "overall" deterioration in quality (App. 45a);

—that cutbacks in research and development by certain suppliers were insufficient to raise a triable issue of whether "overall" research and development declined (App. 44a); and

—that the joint agreement to buy 80% requirements from Southeastern was "reasonable" despite the acknowledged evidence that it far exceeded the minimal amount of volume necessary to establish a viable manufacturing facility. (App. 36a.)

We respectfully submit that the district court here improperly extended *Matsushita* as authority to weigh anti-competitive and pro-competitive effects. *Because every horizontal agreement with boycott or price-fixing elements is anti-competitive on its face, dismissal necessarily entails weighing its facially anti-competitive effects against its pro-competitive benefits—a function properly left to a jury* (if indeed it is not a *per se* violation in the first instance).

Therefore, the district court here (approved by the Fourth Circuit) necessarily engaged in precisely the kind of fact-finding process which is not permitted by Fed. R. Civ. P. 56, and represents an unfounded extension of *Matsushita* far beyond any expressed intention of this Court. The district court decided itself whether the challenged arrangement was good for society, when the fact issues should be determined by society's representatives on the jury.

CONCLUSION

If, as the district court initially held, *per se* treatment was inappropriate because the courts were unfamiliar with the arrangement in issue, it was equally inappropriate to

find, as a matter of law, that the arrangement was procompetitive, reasonable and beneficial to society. The lower court rulings—substantively and procedurally—deprived Sewell of its right to a fair redress of its grievance, or at least a right to a jury determination on the merits of its grievance.

But those rulings also did much more: they effectively excused all concerted buyer conduct from *per se or* Rule of Reason application, and indeed go so far as to preclude a boycotted seller from even pursuing a case against buyers under the "antitrust injury" requirement of Clayton Act § 4. In the process, Rule 56 has been interpreted to authorize the district court to engage in its own complex fact-finding process.

This Petition should be granted to consider and instruct whether the rules of economic competition apply equally to buyers and sellers, and to further consider and instruct whether a *seller's* litigation rights in presenting a grievance against concerted buyer conduct are as protected under the antitrust laws and the Federal Rules of Civil Procedure as are a buyer's.

Respectfully submitted,

ROBERT L. HOEGLE, ESQ.
Counsel of Record
PETER ARON, ESQ.
OLWINE, CONNELLY, CHASE, O'DONNELL & WEYHER
299 Park Avenue
New York, New York 10171
(212) 207-1800

WILLIAM L. RIKARD, ESQ.
PARKER, POE, THOMPSON, GAGE & PRESTON
2600 Charlotte Plaza
Charlotte, NC 28244
(704) 372-9000

December 31, 1990

90-1044
(2)

No.——

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

SEWELL PLASTICS, INC.,
Petitioner,
v.

THE COCA-COLA COMPANY (doing business through its division, COCA-COLA USA); SOUTHEASTERN CONTAINER, INC.; ABERDEEN COCA-COLA BOTTLING CO., INC.; ALABAMA COCA-COLA BOTTLING COMPANY; BISCOE COCA-COLA BOTTLING COMPANY, INC.; CAROLINA COCA-COLA BOTTLING CO., INC.; COCA-COLA BOTTLING COMPANY CONSOLIDATED; COCA-COLA BOTTLING COMPANY OF ANDERSON, SOUTH CAROLINA, INC.; COCA-COLA BOTTLING COMPANY OF ASHEVILLE, N.C.; COCA-COLA BOTTLING COMPANY OF MOBILE; COCA-COLA BOTTLING COMPANY

(Caption Continued on Inside Cover)

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

WILLIAM L. RIKARD, ESQ.
PARKER, POE, THOMPSON,
GAGE & PRESTON
2600 Charlotte Plaza
Charlotte, NC 28244
(704) 372-9000

ROBERT L. HOEGLE, ESQ.
Counsel of Record
PETER ARON, ESQ.
OLWINE, CONNELLY, CHASE,
O'DONNELL & WEYHER
299 Park Avenue
New York, New York 10171
(212) 207-1800

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

110

of Nashville, Inc.; Coca-Cola Bottling Company of Roanoke, Inc.; Coca-Cola Bottling Company of Wilson, Inc.; Coca-Cola Bottling Company United, Inc.; Coca-Cola Bottling Works of Tullahoma, Inc.; Columbia Coca-Cola Bottling Company; Columbus Coca-Cola Bottling Company; Dorchester Coca-Cola Bottling Company; Durham Coca-Cola Bottling Company, Inc.; Eastern Carolina Coca-Cola Bottling Company, Inc.; Fayetteville Coca-Cola Bottling Company; Hampton Bottling Works, Inc.; Lincolnton Coca-Cola Bottling Co., Inc.; Mid South Coca-Cola Bottling Company; Orangeburg Coca-Cola Bottling Co., Inc.; Plymouth Coca-Cola Bottling Co., Inc.; Rock Hill Coca-Cola Bottling Co.; Roddy Manufacturing Company; Sanford Coca-Cola Bottling Company; Tarboro Coca-Cola Bottling Company, Inc.; The Atlanta Coca-Cola Bottling Company; The Coastal Coca-Cola Bottling Company; The Coca-Cola Bottling Company of Henderson, Inc.; The Coca-Cola Bottling Company of Johnson City, Tennessee; and Wilmington Coca-Cola Bottling Works, Inc.,

Respondents.

TABLE OF CONTENTS

APPENDIX Page

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 89-3329

SEWELL PLASTICS INC.,
Plaintiff-Appellant,
versus

THE COCA-COLA COMPANY, d/b/a Coca-Cola USA; ABERDEEN SOUTHEASTERN CONTAINER, INC.; ALABAMA COCA-COLA BOTTLING COMPANY; BISCOE COCA-COLA BOTTLING COMPANY, INC.; COCA-COLA BOTTLING CO., INC.; CAROLINA COCA-COLA BOTTLING CO., INC.; CHARLESTON COCA-COLA BOTTLING CO.; COCA-COLA BOTTLING COMPANY CONSOLIDATED; COCO-COLA BOTTLING COMPANY OF ANDERSON, SOUTH CAROLINA, INC.; COCA-COLA BOTTLING COMPANY OF ASHEVILLE, NC; COCA-COLA BOTTLING COMPANY OF MOBILE; COCA-COLA BOTTLING COMPANY OF NASHVILLE, INC.; COCA-COLA BOTTLING COMPANY OF ROANOKE, INC.; COCA-COLA BOTTLING COMPANY OF WILSON, INC.; COCA-COLA BOTTLING COMPANY UNITED, INC.; COCA-COLA BOTTLING WORKS OF TULLAHOMA, INC.; COLUMBIA COCA-COLA BOTTLING COMPANY; COLUMBUS COCA-COLA BOTTLING COMPANY; DURHAM COCA-COLA BOTTLING COMPANY, INC.; EASTERN CAROLINA COCA-COLA BOTTLING COMPANY, INC.; FAYETTEVILLE COCA-COLA BOTTLING COMPANY; HAMPTON BOTTLING WORKS, INC.; LINCOLNTON COCA-COLA BOTTLING CO.; MID SOUTH COCA-COLA BOTTLING COMPANY; ORANGEBURG COCA-COLA BOTTLING COMPANY, INC.; PLYMOUTH COCA-COLA BOTTLING CO., INC.; ROCK HILL COCA-COLA BOTTLING CO., INC.; RODDY MANUFACTURING COMPANY; SANFORD COCA-COLA BOTTLING COMPANY; TARBORO COCA-COLA BOTTLING COMPANY, INC.; THE ATLANTA COCA-COLA BOTTLING COM-

PANY; THE COASTAL COCA-COLA BOTTLING COMPANY; THE COCA-COLA BOTTLING COMPANY OF JOHNSON CITY,
Defendants-Appellees,

and

WILMINGTON COCA-COLA BOTTLING WORKS, INC.,
Defendant.

Appeal from the United States District Court
for the Western District of North Carolina, at Charlotte
James B. McMillan, Senior District Judge.
(CA--86-363-C-C-M)

Argued: April 3, 1990 Decided: September 4, 1990

Before HALL, PHILLIPS, and MURNAGHAN, Circuit Judges.

Affirmed in part and remanded in part by unpublished per curiam opinion.

ARGUED: Peter Aron, OLWINE, CONNELLY, CHASE, O'DONNELL & WEYHER, New York, New York, for Appellant. Jonathan Mitchell Jacobson, COUDERT BROTHERS, New York, New York; William M. Dreyer, THE COCA-COLA COMPANY, Atlanta, Georgia, for Appellees. ON BRIEF: Alan T. Gallanty, Thomas M. Mueller, OLWINE, CONNELLY, CHASE, O'DONNELL & WEYHER, New York, New York; William L. Rikard, Jr., PARKER, POE, THOMPSON, GAGE & PRESTON, Charlotte, North Carolina, for Appellant. Carolyn T. Ellis, David A. Schwartz-Leeper, COUDERT BROTHERS, New York, New York; W. Thomas Haynes, Steven F. Hauser, THE COCA-COLA COMPANY, Atlanta, Georgia; E. Osborne Ayscue, Jr., Norvin K. Dickerson, III, L. Martin Wright, III, SMITH, HELMS, MULLISS & MOORE, Charlotte, North Carolina, for Appellees.

PER CURIAM:

This is an action by Sewell Plastics, Inc. (Sewell), a manufacturer of plastic soft drink bottles, alleging antitrust and state-law unfair trade practices claims against the Coca-Cola Company (Coca-Cola), Southeastern Container, Inc. (Southeastern), and a number of Coca-Cola's licensed bottlers (the bottlers). Sewell appeals from the district court's grant of summary judgment in favor of all the defendants on its various claims. We affirm.

I

Coca-Cola sells syrups and concentrates to the defendant bottlers under license to bottle and sell its soft drink products in the southeast. The license agreements grant to each bottler the exclusive right to bottle and sell Coca-Cola products within a specific territory, as authorized by the Soft Drink Interbrand Competition Act, 15 U.S.C. §§ 3501 et seq. (authorizing territorial divisions among soft drink bottlers).

Sewell manufactures plastic bottles (PET bottles) widely used by many soft dring bottlers, including the defendant bottlers in this action. In 1981, various of these bottlers told Sewell, that unless Sewell could provide two-liter bottles for $200 per thousand, the bottlers would join together to manufacture their own bottles. When Sewell refused to meet this price demand, the bottlers joined together in 1982 and organized Southeastern as a cooperative to manufacture and supply the bulk of their PET bottle requirements. Under their contracts with Southeastern, the bottlers agreed to purchase 80% of their plastic bottle requirements for a five-year period. The contract further obliged the bottlers to accept Southeastern's set price for the first year, after which the bottlers could purchase more than 20% of their requirement elsewhere only by proving that two other suppliers offered lower prices over a six-month period, and that Southeastern was unable to meet, within sixty days, an

average of the two lowest prices. The bottlers also agreed that Southeastern would charge all contract bottlers the same price, and that transportation costs to bottlers located at different distances would be equalized so that no owner-bottler would enjoy a lower transportation cost by reason of its proximity to Southeastern.

Coca-Cola was intimately involved in Southeastern's formation and operation. As part of its USA Operational Business Plan for 1982-84, Coca-Cola implemented an "operational/strategic ownership plan" to "encourage formation of co-ops where economically feasible." Pursuant to this plan, in early 1981, Marvin Griffin, then head of Coca-Cola's Bottler Operations Department, encouraged bottlers to pursue their own manufacture of bottles with Coca-Cola's help and support. Coca-Cola agreed to guarantee debts generated by Southeastern's formation. After Southeastern's formation, individual bottlers who balked at the idea of cooperative manufacture were called before a Southeastern board meeting held at Coca-Cola headquarters. Two such bottlers subsequently entered contracts with Southeastern. When Southeastern contract-bottlers were occasionally unable to meet Coca-Cola's quality specifications, the specifications were relaxed by Coca-Cola to enable the bottlers to honor their supply contracts with Southeastern.

Sewell brought this action against Coca-Cola, Southeastern, and the participating bottlers alleging a number of claims: (1) that entering into and implementing the requirements and freight equalization contracts constituted a conspiracy to form and the formation of a combination in restraint of trade in violation of § 1 of the Sherman Act, 15 U.S.C. § 1; (2) that the bottlers' agreement to purchase 80% of their requirements from Southeastern, thus potentially foreclosing 40% of the market for PET bottles in the Southeast, constituted an attempt to monopolize and monopolization of a line of commerce in a distinct geographic market in violation of § 2 of the

Sherman Act, 15 U.S.C. § 2; (3) that the requirement contract constituted an exclusive dealing arrangement in violation of § 3 of the Clayton Act, 15 U.S.C. § 14; (4) that the bottlers' ownership of Southeastern stock had the effect of substantially lessening competition in violation of § 7 of the Clayton Act, 15 U.S.C. § 18; and (5) that this conduct violated various provisions of the North Carolina Unfair Trade Practices Act, N.C. Gen. Stat. §§ 75-1 et seq. Sewell sought $17 million in damages and permanent injunctive relief.

Southeastern answered and counterclaimed on allegations of fact related to Sewell's claims. Extensive discovery, yielding a voluminous record, followed and both sides in due course moved for summary judgment.

In May of 1988, the district court granted partial summary judgment in favor of all the defendants, holding that the defendants' conduct was not per se illegal under the antitrust laws invoked, but leaving open the question of violation under a Rule of Reason analysis.

Following refusal by this court to entertain an interlocutory appeal certified under 28 U.S.C. § 1292(b), the district court resumed consideration of the defendants' pending motions for summary judgment on the Sherman Act and other claims. Concerned that Sewell probably had failed so far to produce a forecast of evidence demonstrating an adverse effect on competition, an essential element of all the remaining state and federal claims, the district court ordered all summary judgment motions to be reargued. The focus of the reargument was the effect of the defendants' activities on competition in the relevant market. Following the reargument the district court concluded that, although it had not "heard information that justifies denying the defendants' Motion for Summary Judgment," it would yet deny the motion without prejudice to its renewal and ordered that trial on all the unrelated claims go forward.

After the trial began with counsel making opening statements to the jury, the defendants again moved for summary judgment. This time, the district court orally announced its decision to grant defendants' motions.[1] After the court announced its decision, Sewell requested and was allowed to file additional documentary evidence of injury to competition and defendants were permitted to file responsive material along with proposed "findings of fact and conclusions of law" supporting the grant of summary judgment.[2] After considering the massive submissions, the court on August 25, 1989, rendered an opinion which: (1) vacated its May 1988 order to the extent the order denied the defendants' motion for summary judgment; (2) granted the defendants' motion for summary judgment, dismissing Sewell's claims in their entirety; (3) directed entry of final judgment under Fed. R. Civ. P. 54(b); and (4) stayed Southeastern's counterclaims against Sewell pending final determination of any appeal from the district court's final judgment.

This appeal by Sewell, pursuant to Fed. R. Civ. P. 54(b), followed.

---

[1] Sewell argues that the district court abused its discretion by sua sponte reconsidering its May 6, 1988, summary judgment motion without ten days notice. We hold that this was not an abuse of discretion for reasons sufficiently explained by the district court. See Sewell Plastics, Inc. v. Coca-Cola Co., 720 F. Supp. 1196, 1215 (W.D.N.C. 1989).

[2] Sewell suggests that the district court, picking up on the defendants' submissions, impermissibly "found" facts in considering the defendants' motion for summary judgment. There is no merit to this suggestion. Though the court expressly indicated that it was "finding" certain material facts, see 720 F. Supp. at 1205, it is obvious that what it was doing was following the recommended procedure of identifying for the record those material facts that it "found" to be not in "genuine issue," hence proper predicates for granting summary judgment "as a matter of law." See Fed. R. Civ. P. 56(c); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 & n.6 (1986).

II

As a threshold matter, we address Sewell's assertion of error in the district court's exclusion of certain evidence. The evidence related to a price-fixing conspiracy between defendant Asheville Coke and certain non-party Pepsi bottlers in Asheville's exclusive territory, and a separate, unrelated conspiracy between Anderson Coke and non-party Anderson Pepsi, both of which resulted in guilty pleas by the parties involved. The evidence is uncontradicted that these conspiracies were wholly unrelated to Southeastern. Sewell admitted that no defendant other than Anderson and Asheville were involved in the conspiracies.

Not only would introduction of this evidence have worked to prejudice the other thirty-three defendants who were not involved in these conspiracies, this evidence was properly excluded for Sewell's failure to carry its "burden of demonstrating that the conduct underlying those prior judgments had a direct, logical relationship to the conduct at issue in this case." International Shoe Mach. Corp. v. United States Mach. Corp., 315 F.2d 449, 459 (1st Cir. 1963). The district court clearly acted within his discretion in excluding this evidence.

III

In its initial Order, Sewell Plastics, Inc. v. Coca-Cola Co., 720 F. Supp. 1186 (W.D.N.C. 1988), rejecting as a matter of law Sewell's claim of a per se violation of § 1 of the Sherman Act, and its later Memorandum of Decision, 720 F. Supp. 1196, rejecting as a matter of law all of Sewell's remaining federal and state claims, the district court accurately and comprehensively analyzed the summary judgment record and properly applied controlling substantive and procedural principles in granting the defendants' motion for summary judgment. Its core determinations were that on the basis of material facts of record as to which there was no genuine dispute, de-

fendants' conduct did not as a matter of law constitute a per se violation of § 1 of the Sherman Act; that Sewell had failed to produce a forecast of hard evidence from which a trier of fact, properly instructed on the substantive law and the burden of proof, rationally could find that the defendants' challenged activities had an actual or probable adverse effect on competition in the relevant market; and that in any event, on the undisputed facts of record, Sewell could not as a matter of law establish "anti-trust injury," an essential element of the federal and state claims. Because, for reasons cogently given by the court, one or more of these determinations was dispositive of all of Sewell's federal and state claims, the court found each of them in turn properly subject to dismissal by summary judgment.

Having reviewed the record, the parties' briefs, and the district court's memorandum of decision, and having heard oral argument, we find no reversible error in the district court's disposition. Accordingly, we affirm the grant of summary judgment in favor of the defendants on the opinion of the district court. Sewell Plastics, Inc. v. Coca-Cola Co., 720 F. Supp. 1196 (W.D.N.C. 1989). The case will be remanded for further proceedings on the pending counterclaims.

SO ORDERED

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 89-3329

SEWELL PLASTICS INC.,
Plaintiff-Appellant

v.

THE COCA-COLA COMPANY, d/b/a Coca-Cola USA; SOUTHEASTERN CONTAINER, INC.; ABERDEEN COCA-COLA BOTTLING COMPANY; ALABAMA COCA-COLA BOTTLING COMPANY, INC.; BISCOE COCA-COLA BOTTLING CO., INC.; CAROLINA COCA-COLA BOTTLING CO., INC.; CHARLESTON COCA-COLA BOTTLING CO.; COCA-COLA BOTTLING COMPANY CONSOLIDATED; COCA-COLA BOTTLING COMPANY OF ANDERSON, SOUTH CAROLINA, INC.; COCA-COLA BOTTLING COMPANY OF ASHEVILLE, NC; COCA-COLA BOTTLING COMPANY OF MOBILE; COCA-COLA BOTTLING COMPANY OF NASHVILLE, INC.; COCA-COLA BOTTLING COMPANY OF ROANOKE, INC.; COCA-COLA BOTTLING COMPANY OF WILSON, INC.; COCA-COLA BOTTLING COMPANY UNITED, INC.; COCA-COLA BOTTLING WORKS OF TULLAHOMA, INC.; COLUMBIA COCA-COLA BOTTLING COMPANY; COLUMBUS COCA-COLA BOTTLING COMPANY; DORCHESTER COCA-COLA BOTTLING COMPANY; DURHAM COCA-COLA BOTTLING COMPANY, INC.; EASTERN CAROLINA COCA-COLA BOTTLING COMPANY, INC.; FAYETTEVILLE COCA-COLA BOTTLING COMPANY; HAMPTON BOTTLING WORKS, INC.; LINCOLNTON COCA-COLA BOTTLING CO.; MID SOUTH COCA-COLA BOTTLING COMPANY; ORANGEBURG COCA-COLA BOTTLING CO., INC.; PLYMOUTH COCA-COLA BOTTLING CO., INC.; ROCK HILL COCA-COLA BOTTLING CO., INC.; RODDY MANUFACTURING COMPANY; SANFORD COCA-COLA BOTTLING COMPANY; TARBORO COCA-COLA BOTTLING COMPANY, INC.;

THE ATLANTA COCA-COLA BOTTLING COMPANY; THE COASTAL COCA-COLA BOTTLING COMPANY; THE COCA-COLA BOTTLING COMPANY OF JOHNSON CITY,
Defendants-Appellees

and

WILMINGTON COCA COLA BOTTLING WORKS, INC.,
Defendant

On Petition for Rehearing with Suggestion for Rehearing In Banc

[Filed October 2, 1990]

The appellant's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

Entered at the direction of Judge Phillips with the concurrence of Judge Hall and Judge Murnaghan.

For the Court,

/s/ John M. Greacen
Clerk

APPENDIX C

IN THE DISTRICT COURT
OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF
NORTH CAROLINA
Charlotte Division

C-C-86-363-M

SEWELL PLASTICS, INC.,

Plaintiff,

—vs—

THE COCA-COLA COMPANY (doing business through its division, COCA-COLA USA); SOUTHEASTERN CONTAINER, INC.; ABERDEEN COCA-COLA BOTTLING CO., INC.; ALABAMA COCA-COLA BOTTLING COMPANY; BISCOE COCA-COLA BOTTLING COMPANY, INC.; CAROLINA COCA-COLA BOTTLING CO., INC.; COCA-COLA BOTTLING COMPANY CONSOLIDATED; COCA-COLA BOTTLING COMPANY OF ANDERSON, SOUTH CAROLINA, INC.; COCA-COLA BOTTLING COMPANY OF ASHEVILLE, N.C.; COCA-COLA BOTTLING COMPANY OF MOBILE; COCA-COLA BOTTLING COMPANY OF NASHVILLE, INC.; COCA-COLA BOTTLING COMPANY OF ROANOKE, INC.; COCA-COLA BOTTLING COMPANY OF WILSON, INC.; COCA-COLA BOTTLING COMPANY UNITED, INC.; COCA-COLA BOTTLING WORKS OF TULLAHOMA, INC.; COLUMBIA COCA-COLA BOTTLING COMPANY; COLUMBUS COCA-COLA BOTTLING COMPANY; DORCHESTER COCA-COLA BOTTLING COMPANY; DURHAM COCA-COLA BOTTLING COMPANY, INC.; EASTERN CAROLINA COCA-COLA BOTTLING COMPANY, INC.; FAYETTEVILLE COCA-COLA BOTTLING COMPANY; HAMPTON BOTTLING WORKS, INC.; LINCOLNTON COCA-COLA BOTTLING CO., INC.; MID SOUTH COCA-COLA BOTTLING COMPANY; ORANGEBURG COCA-COLA BOTTLING CO., INC.; PLYMOUTH COCA-COLA BOTTLING CO., INC.; ROCK HILL COCA-COLA BOTTLING CO.; RODDY MANUFACTURING

COMPANY; SANFORD COCA-COLA BOTTLING COMPANY; TARBORO COCA-COLA BOTTLING COMPANY, INC.; THE ATLANTA COCA-COLA BOTTLING COMPANY; THE COASTAL COCA-COLA BOTTLING COMPANY; THE COCA-COLA BOTTLING COMPANY OF HENDERSON, INC.; THE COCA-COLA BOTTLING COMPANY OF JOHNSON CITY, TENNESSEE; and WILMINGTON COCA-COLA BOTTLING WORKS, INC.,

Defendants.

MEMORANDUM OF DECISION

[Filed August 25, 1989]

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

I. SUMMARY OF DECISION

Plaintiff Sewell Plastics, Inc. ("Sewell") is a sizeable Delaware corporation headquartered in Atlanta, Georgia. Sewell is a wholly-owned subsidiary of Constar International, Inc., formerly known as The Dorsey Corporation. Sewell is the largest manufacturer of plastic soft drink bottles in the United States. Starting about 1977, Sewell was a pioneer in making plastic two-liter soft drink bottles from polyethylene terephthalate ("PET").

Defendant The Coca-Cola Company ("Coke") is a sizeable Delaware corporation also headquartered in Atlanta, Georgia. It sells syrups and concentrates to licensed bottlers. Its licensees sell soft drink products to consumers under the names "Coke" and "Coca-Cola" and other trademarks owned by The Coca-Cola Company. The Coca-Cola Company has ownership interests in certain bottlers, one of which is also a defendant.

Defendant Southeastern Container, Inc. ("Southeastern"), is a North Carolina corporation, owned by the defendant bottlers, which manufactures plastic soft drink bottles for sale to its owners. Although it is not organized as a cooperative association under North Carolina law, Southeastern fits the lay description of a "cooperative"; its officers and agents call it a "cooperative"; the complaint and several of plaintiff's documents (which are now defendants' exhibits) refer to Southeastern as a "cooperative"; and the court will do likewise.

The remaining thirty-three defendants ("Bottlers") are bottlers licensed by The Coca-Cola Company to bottle and sell its soft drink products. They own and operate bottling facilities for Coke and other soft drink products in North and South Carolina, Georgia, Virginia, Tennessee, and Alabama. Under their agreements with The Coca-Cola Company, the Bottlers have exclusive sales territories.

By 1981, Sewell was supplying the defendant bottlers with over ninety percent of their plastic two-liter soft

drink bottles. In 1981, those sales of soft drink bottles to defendants amounted to more than one hundred million bottles.

In 1982, the bottler defendants organized Southeastern to make plastic bottles for them and they started purchasing most of their plastic bottles from Southeastern. Thereafter, through 1986, they bought only about seventeen percent (23.8 million dollars worth) of their bottle requirements from Sewell.

Economic consequences in the relevant market of the bottle-making actions of defendants were dramatic.

Prices for plastic bottles dropped to about half what they had been when Sewell had the regional bottle manufacturing market mostly to itself.

Prices have remained low.

The number of competitors in the market has remained the same, but market concentration has decreased.

Some competitors have left the bottling business, and others have entered it.

Consumers benefit from lower bottle prices.

Production of plastic bottles has increased.

Production processes have continued to become more efficient.

Although some competit*ors* may be making less profit, there has been no adverse effect on competit*ion*.

"The antitrust laws . . . were enacted for 'the protection of competition, not competitors,'" *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977) (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962) (emphasis in original)).

The court concludes that defendants are entitled to judgment as a matter of law and that the complaint should be dismissed.

II. PROCEDURAL HISTORY

Plaintiff filed the complaint on August 5, 1986. Docket No. 1. Sewell alleges that through continuing violations of federal antitrust laws and the North Carolina Unfair Trade Practices Act defendants have foreclosed Sewell "from effectively competing for a substantial portion of the market for the sale of [plastic beverage] bottles to soft drink bottlers within the southeastern United States." Complaint para. 1. Specifically, Sewell claims that defendants have conspired to form and have formed a combination in restraint of trade in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1 (1982); have attempted to monopolize and have monopolized a line of commerce in a distinct geographic market in violation of Section 2 of the Sherman Act, 15 U.S.C. § 2 (1982); have engaged in an exclusive dealing arrangement in violation of Section 3 of the Clayton Act, 15 U.S.C. § 14 (1982); have acquired stock with the effect of substantially lessening competition in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18 (1982 & Supp. V 1987); and have violated various provisions of the North Carolina Unfair Trade Practices Act, N.C. Gen. Stat. §§ 75-1, 75-1.1, 75-5(b)(1, 2, 3, 7) (1988).

Sewell claims that the effect of defendants' alleged violations "has been to transform a once competitive marketplace into non-competitive one, where competition in the sale of plastic beverage bottles to bottlers franchised by The Coca-Cola Company has been virtually eliminated." Complaint para. 3. Sewell claims damages in excess of $17 million, and seeks monetary and permanent injunctive relief.

On September 26, 1986, defendant Southeastern filed its answer. Docket No. 4. On September 29, 1986, defendant Coke filed its answer. Docket No. 5. On October 3, 1986, the Bottlers filed their answers. Docket Nos. 6-39. On May 7, 1987, the court allowed Southeastern to amend its answer, Docket No. 65, and Southeastern filed an

amended answer asserting several counterclaims against Sewell. Docket No. 66.

Discovery commenced soon after the complaint was filed. The court set a discovery deadline of August 31, 1987, which, by and large, the parties met. Depositions of at least 100 persons were taken, and over three million pages of documents were produced by the parties and various nonparties. The parties left some discovery, mostly testimony of expert witnesses, to be scheduled as agreed after the deadline.

On September 29, 1987, defendants moved pursuant to Fed.R.Civ.P. 56 for summary judgment. Docket No. 95. On October 27, 1987, defendants filed a revised motion for summary judgment. Docket No. 102. On November 4, 1987, plaintiff filed its opposition to defendants' motion for summary judgment. Docket No. 102A.

On November 6, 1987, the court heard defendants' motion for summary judgment. At the hearing, defendants' counsel argued that on the basis of ten "undisputed" facts, the court should enter judgment for defendants as a matter of law. Docket No. 138 at 11-19 (Transcript of November 6, 1987, hearing). Plaintiff's counsel argued that most of the defendants' facts were sharply disputed, and started to present plaintiff's version of the "undisputed" facts. *Id.* at 23-47. Convinced that a swearing match among counsel would not produce a statement of truly undisputed facts, the court adjourned the hearing. In order to facilitate resolution of defendants' summary judgment motion, the court ordered the parties to reduce their contentions to writing and to serve them on the opposing parties pursuant to Fed.R.Civ.P. 36 as requests for admission. *Id.* at 47-53. At the end of the hearing, defendant Coke was permitted to file a separate motion for summary judgment, Docket No. 104, and that motion was incorporated in the process for admissions outlined by the court. *Id.* at 53-54.

On November 13, 1987, the court filed an order setting deadlines for serving requests for admissions and responding to those requests. Docket No. 108. The November 13 order also directed that, after the requests for admission were answered, defendants file a statement of undisputed facts in support of their motions for summary judgment and plaintiff file a statement of any facts which would warrant denial of defendants' motions.

On December 1, 1987, plaintiffs moved pursuant to Fed.R.Civ.P. 12 and 56 that the court (a) declare the terms and conditions of the agreements between Southeastern and the Bottlers pursuant to which the Bottlers purchase bottles from Southeastern to be illegal *per se* under Section 1 of the Sherman Act, 15 U.S.C. § 1; (b) declare the agreement among Southeastern and two other manufacturers of plastic beverage bottles to *purchase* PET resin jointly from resin suppliers to be illegal *per se* under Section 1 of the Sherman Act, 15 U.S.C. § 1; (c) dismiss Southeastern's counterclaim; and (d) strike defendants' affirmative defenses based on the Soft Drink Interbrand Competition Act of 1980 and Coke's Sixth Affirmative Defense. Docket No. 109.

Defendants jointly served Sewell with 219 requests for admission; Coke separately served Sewell with 157 requests for admission; and Sewell served defendants with 311 requests for admission. When the dust settled in mid-February, 1988, the request for admissions process, intended to narrow and clarify the issues for decision, had instead bloated the record with the addition of a stack of paper over three feet thick. *See Sewell Plastics, Inc. v. The Coca-Cola Company*, 119 F.R.D. 24 (W.D.N.C. 1988) (written and pictorial description of the summary judgment record).

On March 1, 1988, the court tried again. Observing that "[i]n the battle of manpower, the volume of paper which a modern law firm can produce is often greater

than a busy district judge can read and evaluate with care," the court ordered the plaintiff and each group of defendants to file "a statement of *undisputed material* facts either expressly *admitted* or *sworn to and undisputed on the record*, not exceeding ten (10) pages." *Id.* at 25-26. In addition, the court ordered counsel to "meet and make a serious effort to agree on *and sign a written agreement* on the facts necessary to decide the summary judgment motions." *Id.* at 26. In response to the March 1 order, plaintiff and each group of defendants filed a statement of facts. Docket Nos. 139-42. The parties filed a stipulation. Docket No. 143. Plaintiff filed an outline in opposition to defendants' statements of "purportedly undisputed" facts. Docket No. 144.

On April 18, 1988, the court heard: (1) defendants' motion for summary judgment; (2) Coke's separate motion for summary judgment; and (3) plaintiff's motion for declaration of *per se* illegality. At the hearing, defendants' counsel argued that "whether Sewell had shown an adverse effect on competition is a dispositive point." Docket No. 150 at 20 (Transcript of April 18, 1988, hearing). Defendants' counsel pointed out that Sewell had: (1) stipulated that "Southeastern's prices have decreased from \$220 a thousand for 2-liter bottles to \$146"; (2) admitted that "plastic beverage bottle prices in general have decreased since 1982 when Southeastern was formed"; (3) stipulated that "output of plastic bottles sold to the bottler Defendants has increased every year"; (4) supplied a witness who testified that "output of plastic bottles in the market as a whole has increased since 1982"; and (5) stipulated that the "number of competitors in the Southeast area, which is the market alleged by Sewell, has not declined since Southeastern was formed." *Id.* at 21-22. Defendants' counsel urged the court "to focus on whether the challenged activity has the actual or probable effect of decreasing market output or increasing market prices." *Id.* at 20.

During the April 18, 1988, hearing, plaintiff's counsel did not dispute the above facts as set forth by defendants. Instead, plaintiff assumed the correctness of those facts and argued that : (1) "[e]very fact is consistent with a buyer price-fixing conspiracy, so there is no way you have these facts could [sic] a Defendant be entitled to judgment as a matter of law"; and (2) "these facts are equally consistent with a growing marketplace and a lot of competitiveness that have nothing to do with the activities in question." *Id.* at 31. When pressed by the court to describe the adverse effects of defendants' conduct *on competition*, plaintiff's counsel stated that "the principal adverse effect is that the business of the bottler Defendants, of approximately 33 or so bottlers all located in the same geographic area, is not open for competition from Sewell or for anyone else. . . ." *Id.* at 37.

At the end of the April 18, 1988, hearing, the court denied plaintiff's motion for summary judgment on Southeastern's counterclaim and motion to strike Coke's sixth affirmative defense. The court took the remaining motions under advisement. *Id.* at 96.

Given the apparent procompetitive benefits arising from the formation and operation of Southeastern, the court concluded that defendants' activities were not illegal *per se* under the Sherman Act. Although the data on price and output were damning to plaintiff's case, the court rejected defendants' attempt to limit consideration of anticompetitive effects to price and output as too narrow. Although plaintiff had not set forth any specific facts demonstrating an adverse impact on competition, the court at that time was willing to assume that plaintiff had produced at lesat a scintilla of evidence on the subject in a stack of papers over three feet high. Also, believing that "summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles," *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464, 473 (1962), the court

concluded that plaintiff's claims could be a tried to a jury under the rule of reason.

Consistent with its then thinking, the court filed a twenty-page order on May 6, 1988, which: (1) granted summary judgment to defendants on the question whether their activities were illegal *per se* as a group boycott or price-fixing; (2) denied defendants' motion for summary judgment in all other respects; (3) denied Coke's separate motion for summary judgment; and (4) denied plaintiff's motion for declaration of *per se* illegality. Docket No. 146. Approximately nineteen of the twenty pages were devoted to the question of *per se* illegality. Quoting *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1, 9 (1979), the court held that any restraints on competition arising out of the formation and operation of Southeastern were not on their face "plainly anticompetitive and without redeeming value." Docket No. 146 at 15, 19. The remaining one page of text rejected defendants' argument that anti-competitive effects are limited to raising prices or reducing output, and without further discussion held that plaintiff's evidence was sufficient to raise issues of material fact for trial under the Rule of Reason as to the anti-competitive effects of the restraints arising out of the formation and operation of Southeastern. *See id.* at 16-17, 20.

On May 11, 1988, defendants moved that the court amend the May 6, 1988, order to include findings necessary to certify two questions for immediate appeal pursuant to 28 U.S.C. § 1292(b). Docket No. 147. On May 12, 1988, defendant Coke moved that the court reconsider denial of its separate motion for summary judgment or, alternatively, certify the denial of Coke's motion for summary judgment for immediate appeal pursuant to 28 U.S.C. § 1292(b). Docket No. 148.

On July 27, 1988, the court amended the May 6, 1988, order to include specific factual findings about Coke's role in the formation and operation of Southeastern. Docket

No. 152. Also, on July, 27, 1988, the court, uncertain that its assumption about the record was correct, certified two questions for immediate appeal pursuant to 28 U.S.C. § 1292(b):

> 1. Is plaintiff's evidence of an adverse effect on competition legally sufficient to raise a genuine issue of fact as to whether defendants have violated Sections 1 or 2 of the Sherman Act, or Sections 3 or 7 of the Clayton Act, or N.C. Gen. Stat. §§ 75-1, 75-1.1, 75-5(b) (1,2,3,7)?
>
> 2. To establish a violation of the antitrust laws, in a case in which the "Rule of Reason" applies, must a plaintiff show some actual or probable adverse effect on price or output?

Docket No. 153. The July 27 order certifying the questions for appeal also provided that this action would be stayed if the Fourth Circuit Court of Appeals granted defendants permission to pursue the discretionary appeal.

On September 6, 1988, the United States Court of Appeals for the Fourth Circuit denied defendants' petition for leave to take an interlocutory appeal. Docket No. 163.

On November 3, 1988, the court held a status conference and ordered: (1) that all motions by the parties be filed not later than January 16, 1989; (2) that jury selection take place on March 23, 1989; and (3) that the clerk calendar this action for trial in a six-week jury term beginning on March 28, 1989. Docket No. 172.

The clerk calendared all pending motions for hearing on March 1, 1989. In preparing to hear those motions, the court was again required to scrutinize plaintiff's theory of the case and the sufficiency of its evidence. Still concerned about the assumption that plaintiff had produced or could produce evidence demonstrating an adverse effect on competition, the court considered asking for reargument of defendants' motion for summary judg-

ment at the March 1, 1989, hearing. Also, a letter from defendants' counsel dated February 16, 1989, urged the court to reconsider the May 6, 1988, order. Ultimately, the court decided against asking for reargument at that time.

The court heard the motions on March 1, 1989, and on March 3, 1989, filed an order ruling on the motions. Docket No. 196.

Over the next few weeks, as the time for selecting the jury drew near, the court became increasingly concerned over the lack of evidence to support plaintiff's claims. Finally, on March 21, 1989, thinking that "after a long period of sweating over this case it was not unfair to ask the plaintiff again to show [the court] the color of his money," Docket No. 205 at 7 (Transcript of March 22, 1989, hearing), the court ordered that the summary judgment motions be reargued on March 22, 1989. Docket No. 198. Upon obtaining a copy of the order later in the day on March 21, 1989, plaintiff inquired of the court and was informed that the focus of the reargument would be defendants' motion for summary judgment. Docket No. 203.

On Wednesday, March 22, 1989, the court again heard defendants' motion for summary judgment. At the hearing, the court first addressed plaintiff's motion that the court vacate the March 21, 1989, order and postpone the commencement of the trial for 48 hours or, in the alternative, continue the trial and postpone the rehearing on the motion for summary judgment for at least ten days. *Id.* In support of the motion, plaintiff's counsel argued that "it is sort of hard to all of sudden reorient yourself back to a Summary Judgment mode from what you were trying to do to put together the efficient, effective presentation of your case." Docket No. 205 at 3. The following dialogue ensued.

COURT: What do you intend to say to the jury in your opening statement that you don't know now?

PLAINTIFF'S COUNSEL: I don't know—I mean, I think we know what we are going to say to the jury.

* * *

COURT: If you were making an opening statement to the jury this morning, would it not be necessary, in order not to run the risk of being dismissed on your opening statement, that you recite to the jury the evidence which you say will support your—

PLAINTIFF'S COUNSEL: Yes, sir, and we are prepared to do that.

COURT: That's what I want to hear from you today.

PLAINTIFF'S COUNSEL: We can do that . . . .

Docket No. 205 at 4-5.

Plaintiff had one other problem with rearguing defendants' motion for summary judgment. Without conceding (or even suggesting) that the record as of May 6, 1988, was inadequate to support the court's initial decision that plaintiff's claims presented a genuine issue for trial, plaintiff in its motion pointed out that, since the partial denial of defendants' motion for summary judgment, it had amassed "additional" evidence in support of its claims which was not in the record. Docket No. 203 at 5. Addressing this concern, the court stated that it was not "asking that any evidence be put in the record." Docket No. 205 at 6. Instead, the court emphasized that it simply wanted to be directed to evidence in the already voluminous record which would justify submitting plaintiff's case to the jury. *Id.* The court specifically stated that it would be content to hear "an argument from each side on the Summary Judgment Motion on the state of the record, as it now stands." *Id.* at 8. However, the court pointed out that if plaintiff intended to rely on its "additional" evidence in order to overcome defendants' motion for sum-

mary judgment, Fed.R.Civ.P. 56 required plaintiff to produce the additional" evidence to the court in the form of "specific facts showing that there is a genuine issue for trial." *See* Docket No. 205 at 18-20.

The focus of reargument was the effect of defendants' activities on competition in the relevant market. *Id.* at 14. During the hearing the court asked questions regarding the price of plastic bottles; output of plastic bottles; evidence of predatory pricing by Southeastern; whether Southeastern's activities had forced any competitors out of the market; and whether there were other competitors in or seeking to enter the market. *Id.* at 14-15, 30-31, 33, 36. In attempting to address those questions, plaintiff's counsel was not able to cite the court to any specific portions of the existing record. Instead, plaintiff's counsel summarized evidence *not* in the record and asserted that "[w]e can produce the documents we are going to rely on." *Id.* at 20. (Defendants, on the other hand, tendered the final report of their economist (the preliminary version of which was filed on September 12, 1988, Docket No. 166), which corroborated and elaborated on the trends regarding prices, output and the number of competitors in the market stated by defendants' counsel at the April 18, 1988, hearing. *Id.* at 32.)

At the end of the hearing, the court concluded that it had not "heard information that justifies denying the Motion for Summary Judgment." *Id.* at 44. However, since the court has for years avoided summary judgment, and had not heard and seen all of plaintiff's evidence, the court denied defendants' motion for summary judgment without prejudice to renewal and ordered that jury selection and trial go forward as scheduled. *Id.* at 44-45. The court noted that it intended to "listen to the opening statements because I will need more clarification than I have on exactly what happened." *Id.* at 46.

On Thursday, March 23, 1989, a jury was selected and empanelled. After jury selection, defendants renewed

their motion for summary judgment. Docket No. 218 at 134 (Trial Transcript, March 23, 1989). In response to the renewed motion, plaintiff argued that it would offer evidence at trial of at least 18 kinds of anticompetitive effects. *Id.* at 138. For the first time, plaintiff asserted that there would be some evidence of predatory pricing by defendants. *Id.* When defendants' counsel pointed out that they had never heard allegations of predatory pricing previously, plaintiff's counsel responded by stating that "there was no occasion to tell them." *Id.* Without entertaining extended argument, the court noted that it was "still waiting for the evidence which would support a recovery," and suggested that "if [plaintiff has] evidence which will rebut a Summary Judgment Motion, the time for me to see it is Monday and Tuesday." *Id.* at 140-41. In response, plaintiff's counsel asserted that they could present some of their evidence if the court would give them 30 minutes. *Id.* at 141. However, when the court offered to remain available for thirty minutes while counsel gathered the evidence, plaintiff's counsel instead promised "to submit something to [the court] in writing Tuesday morning [the first day of trial]." *Id.* at 142.

On Tuesday, March 28, 1989, the trial began with counsel making opening statements to the jury. Consistent with the theory stated in the complaint, plaintiff's counsel argued that "[w]hat this case is about is that [*the Bottlers*] set [Southeastern] up in a way so that no one . . . any longer could compete for the business of *those bottlers*." Docket No. 219 at 157 (Trial Transcript, March 28, 1989) (emphasis added). Plaintiff's counsel argued that the "anticompetitive" effects of Southeastern's formation and operation had been "severe": (1) Some "healthy" suppliers had gone out of business; (2) Southeastern had at times experienced quality problems with its bottles; and (3) Consumers of soft drinks had been unable to purchase Coke products in the plastic bottle they preferred. *Id.* at 163, 166-67.

After opening statements, defendants again renewed the motion for summary judgment. *Id.* at 211. Defendants argued that "[n]othing in the Plaintiff's opening statement indicated that proof will be forthcoming on an adverse effect on competition." *Id.* Plaintiff's counsel again argued that evidence of lower prices, put forth by defendants' in their opening statements, was a form of competitive injury consistent with a buyer price fixing conspiracy. *Id.* at 213. After taking the motion under advisement during the luncheon recess, the court concluded that "I had better vote my conscience on the merits now, instead of going through [a trial] first." *Id.* at 231. The court announced its intention to grant defendants' motion for summary judgment, requested that defendants propose findings of fact in accord with the ruling and asked that plaintiff respond to defendants' proposals. *Id.*

After the court announced its decision, plaintiff's counsel stated, "[W]e did have in preparation responses to the questions you asked last Wednesday [March 22], and we do have them ready to file, and would like to offer them to the Court . . . as part of the record." *Id.* at 234. Plaintiff then, *after* the decision had been announced, filed what it considered to be its response to the court's questions concerning injury to competition and three volumes of a four volume appendix to its response. Docket Nos. 208-11. On March 31, 1989, plaintiff again filed its response and the complete four volume appendix. Docket Nos. 212-16. [These submissions are duplicative.]

On April 4, 1989, defendants filed four volumes of evidentiary material in response to planitiff's March 31, 1989, submissions. Docket Nos. 220-23. On April 5, 1989, defendants filed proposed findings of fact and conclusions of law, twenty-nine pages long, with a one volume evidentiary appendix. Docket No. 224-25. On April 12, 1989, plaintiff filed (1) a 210-page response to defendants' proposed findings, (2) one volume of exhibits to its response and (3) a *seven* volume appendix to its response. Docket

Nos. 234-42. On April 24, 1989, plaintiff filed an *eight* volume appendix of "additional documents and transcript excerpts previoulsy cited in the record." Docket Nos. 251A-H. On May 5, 1989, defendant Coke filed additional evidentiary materials. Docket Nos. 256-58. Thus, all in all, *after* the court's announced decision to grant defendants' motion for summary judgment, a total of over five feet of paper was filed with the court!

III. FINDINGS OF FACT

As the Supreme Court has noted, Fed.R.Civ.P. 56 does not require the trial judge to make findings of fact; however, in many cases, "findings are extremely helpful to a reviewing court." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 & n.6 (1986). By relying almost exclusively on quotations from the complaint, on admissions and stipulations, and on Sewell's own internal documents, the court has tried to cut through what is now an approximately thirteen-foot thick record and produce a statement of material facts which are either undisputed or, where a question is disputed, viewed in the light most favorable to plaintiff.

The "substantive law will identify which facts are material." *Id.* at 248. Thus, in setting forth the facts below, the court will be guided by what the Supreme Court has referred to as "the classic statement of the rule of reason." *Arizona v. Maricopa County Medical Society*, 457 U.S. 332, 343 n.13 (1982).

> The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the re-

> straint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court interpret facts and to predict consequences.

Chicago Board of Trade v. United States, 246 U.S. 231, 238 (1918) (Brandeis, J.).

For purposes of deciding defendants' motion for summary judgment, the court has adopted plaintiff's definition of the relevant market. The *product* market is plastic beverage bottles of all sizes, 16-ounce/half-liter, one-liter, two-liter and three-liter. The *geographic* market is what plaintiff refers to as the "Southeast area": North Carolina; South Carolina; Georgia; Southeastern Virginia, including Roanoke and Lynchburg; North Alabama, including Birmingham and Tuscaloosa; and Eastern Tennessee, including Nashville. PTX 14,107.

The court will use the following short forms of citation in the findings and conclusions: (1) Sewell's answers to defendants' joint requests for admission, Docket No. 135, filed March 2, 1988, will be referred to as "Sewell Adm."; (2) Sewell's answers to Coke's separate requests for admission, Docket No. 134, filed March 2, 1988, will be referred to as "Sewell Coke Adm."; (3) defendants' answers to Sewell's requests for admission (dated December 18, 1987), Docket No. 250, filed April 24, 1989, will be referred to as "Defendants Adm."; (4) the stipulation of facts by the parties, Docket No. 143, filed March 21, 1988, will be referred to as "Stip. A"; (5) documents marked by plaintiff as exhibits for trial will be referred to as "PTX"; (6) documents marked by defendants for trial will be referred to as "DTX"; and (7) plaintiff's response to defendants' proposed findings of fact and conclusions of law, Docket No. 234, filed April 12, 1989, will be referred to as "Plaintiff's Response."

Finally, in calling for reargument of the summary judgment motions, the court was content with the already voluminous record. However, the court naturally wanted to see any additional evidence developed by plaintiff in support of its claims, especially if that evidence was necessary to overcome defendants' motion. As of Wednesday, March 22, plaintiff was aware of the court's concerns about whether a trial was warranted. Plaintiff failed to file any evidence in response to the questions about the impact of defendants' activities on competition until *after the court, on March 28, 1989, announced its intention to grant defendants' summary judgment motion.* Fed.R. Civ.P. 56(c) requires the court to decide summary judgment motions on the basis of evidence "on file." Although plaintiff had failed to file or otherwise come forward with additional evidence *in a timely manner*, the court felt that it ought to consider everything that had been filed since, as well as before, the time the court announced its decision. Therefore, the court has considered all the materials submitted by plaintiff after March 28, 1989, although most of it is irrelevant to the summary judgment motion and much of it would be inadmissible at trial. That evidence does not change the merits of the case.

A. "Introducing the Plastic Bottle: Sewell A Leading Supplier." [1]

"As of 1977, packaged carbonated soft drinks in this country were sold in containers made of glass, aluminum or steel. In or about 1977, Sewell, among others, began manufacturing plastic soft drink bottles made of PET material. During the late 1970's, Sewell became a leading manufacturer of plastic beverage bottles, which readily gained popularity with bottlers and consumers." Complaint para. 11. Sewell was the first supplier of the two liter plastic beverage bottle to a Coca-Cola bottler, supply-

---

[1] This is the heading used by plaintiff in the Complaint. Docket No. 1 at 16.

ing the Spartanburg, South Carolina, bottler in August 1977. PTX 6. Dorsey's 1978 Annual Report referred to Sewell as the "dominant supplier of the PET 2 liter soft drink package in its marketplace." DTX 2 at 3.

"[C]hoice of plant location has been an important competitive element in the [plastic bottle] industry: nearness to the customer [is] an advantage, as it [makes] service easier and [results] in lower freight charges." Complaint para. 13. "Sewell's ability to set up plants in locations where Sewell would be well-positioned to supply surrounding bottlers contributed to Sewell's success." Plaintiff's response, Tab 1 at 29.

"Prior to October 1980, Sewell was the only company with a plant for manufacturing plastic beverage bottles physically located in North Carolina, South Carolina, or Virginia that was authorized to supply bottlers of Coca-Cola. (Sewell had no Virginia plant.) As of October 1980, however, there were other suppliers with manufacturing plants located outside North Carolina, South Carolina, and Virginia that were authorized to supply plastic beverage bottles to Coca-Cola bottlers, including bottlers located within those states; and in October 1980, Coca-Cola USA authorized Incon's Columbia, SC, plant to supply plastic beverage bottles to bottlers of Coca-Cola. By 1981, Icon's plant in Clinton, NC, was authorized to supply bottlers of Coca-Coca. According to invoices produced by the bottler defendants, in 1981, with the exception of 15,984 two-liter bottles shipped by Owens-Illinois to Columbia Coke in May 1981, the only purchases of plastic bottles by bottler defendants located in North Carolina, South Carolina or Virginia were from Sewell or Incon." Stip. A para. 15.

By 1981, Sewell was the leading supplier in the Southeast area market, producing and selling just over 50% of the plastic bottles in the Southeast area. *See* Section III.D.3, *infra*. Sewell also was the leading supplier for the defendant Bottlers. "Based on bottler defendant rec-

ords produced in this litigation, during calendar year 1981, Sewell sold more than 90% of the two-liter and half-liter plastic beverage bottles purchased by the bottler defendants in the aggregate." Stip. A para 5. The complaint alleges and the data compiled by the parties confirms that Sewell's sales to the defendant Bottlers in 1981 were over 100 million bottles. Complaint para. 14; Docket No. 216, Tab 36 (plaintiff's data); DTX 301, Table 8.A.3.

In 1978 Sewell's two-liter "bare bottle" list price (*i.e.*, excluding labels and cartons) was $242.67 per thousand, plus delivery. Sewell Adm. 1.6. Sewell increased its list prices for two-liter plastic beverage bottles every year from 1978 to 1981. Sewell Adm. 1.7. By August, 1981, the bare bottle list price had increased to $320.33 per thousand, plus delivery. Sewell Adm. 1.8. It is undisputed that not all of Sewell's sales were at list prices, and by 1981, most were not. Plaintiff's response, Tab 1 at 30. For example, in November, 1980, Sewell's list price for unlabeled two liter bottles in a 6 pack 200# test HSC carton with H-divider was $332.65 per thousand, (reflecting Sewell's bare bottle price of $292.33). DTX 574 (price list effective September 15, 1980). However, according to a Sewell internal memorandum dated November 24, 1980, a price range from $275 to $285 per thousand for two liter bottles in a 6 pack 200# test HSC carton with H-divider was "representative of Eastern market." DTX 612. Nevertheless, in November, 1980, several of the defendant Bottlers *were* paying Sewell's *list* prices.[2] DTX 614; DTX 608; Sewell Adm. 1.10.

---

[2] Unlike antitrust law in general and this suit in particular, the plastic bottle industry is not lacking in sex appeal. A Sewell interdepartment memorandum states that:

> It has now been approximately six weeks since Incon was approved to supply Coca-Cola Bottlers. Their pricing has been somewhat *erotic* [sic] with both labeled and unlabled bottles in a 6/1 200# H-divider box being quoted at $315.00/m.

DTX 614 (November 25, 1980).

In 1977, Sewell earned net profits of $3,867,000. Sewell Adm. 1.11. In 1987, Sewell earned net profits of $35,689,000, an 823% increase over 1977. Sewell Adm. 1.12. In 1980, Sewell's return on net operating assets was 42.2%.[3] Sewell Adm. 1.13. Sewell's profitability in 1980 was at least partly due to the fact that without major regional competition its prices remained well above its manufacturing costs. For example, while prices in November, 1980, were within the $275-$332 range discussed *supra*, Sewell's true two liter *manufacturing* cost was only $210. DTX 612.

Plaintiff argues that by 1980 the number of merchant suppliers had increased and, as a result of an oversupply of this product, merchant suppliers in the Southeast area engaged in substantial price competition. Plaintiff's response, Tab 1 at 31, 37. In support of this argument, plaintiff has submitted hundreds of "Competitive Price Requests" dated from July, 1979, to October, 1982. PTX 16,000-16,684. Although the evidence was not part of the summary judgment record as of March 28, 1989, what it shows is that there was substantial price competition in the Southeast area beginning in approximately 1980 which often caused Sewell to sell plastic bottles at prices *lower* than its list prices.

B. Formation of Other "Cooperatives" By Soft Drink Bottlers.

"South Atlantic Canners (SAC) is a corporation (sometimes called a 'canning cooperative') formed in or about 1975 by a group of Coca-Cola bottlers in or about the Southeast area. Several of the bottler defendants are, or have been, members of SAC." Stip. A. para. 11. SAC was formed " for the purpose of owning and operating an expensive, high-speed metal can filling line,"

---

[3] Plaintiff now disputes this fact, which it had previously admitted without qualification in answering a request for admission. Plaintiff's response, Tab 1 at 38.

because "[n]one of its members then sold or now sell a sufficient number of filled metal cans to support the expense of buying and operating a can filling line." Mizell Aff., September 24, 1987, at para. 2. By September 1987, there were eleven canning "cooperatives" operating in the Coca-Cola system. Woodlee Aff., September 14, 1987, at para. 5.

Starting in or about 1980, before the formation of Southeastern, manufacturers of plastic bottle manufacturing equipment began encouraging bottlers to consider self-manufacture of plastic bottles. Sewell Coke Adm. 18.3. Pepsi-Cola bottlers such as the Pepsi bottler in Cranston, Rhode Island, and Carolina Packaging, the Pepsi plastic bottle manufacturing "cooperative" in Cheraw, South Carolina, began manufacturing plastic bottles for their use before any Coca-Cola bottlers did. Sewell Coke Adm. 15.3. Carolina Packaging was formed in late 1978 by Carolina Canners, Inc., a Pepsi canning "cooperative." Mizell Aff., September 24, 1987, at para. 6. In 1979, Western Container, a plastic bottle manufacturing "cooperative" was formed in Big Spring, Texas, by Coca-Cola bottlers; several of these bottlers were members of Southwest Canners, a Coca-Cola bottler canning "cooperative." Sewell Adm. 3.9. In late 1981 and early 1982, members of Gulf States Canners, another Coca-Cola bottler canning "cooperative," formed a "cooperative" to manufacture plastic bottles at Gulf States' plant in Clinton, Mississippi. Sewell Adm. 3.10.

C. The Formation of Southeastern.

According to plaintiff's internal memoranda, in May and June, 1981, before the formation of Southeastern, representatives of South Atlantic Canners told Sewell that they wanted to discuss a self-manufacturing arrangement and/or group purchasing through a buying co-op in order to reduce packaging costs and better compete with Carolina Canners. DTX 678; DTX 706.

In 1981, the bottler members of SAC decided to pursue the possibility of forming a plastic bottle manufacturing "cooperative" in order to produce bottles for themselves. DTX 1061. They formed Southeastern Container in 1982. The plant was constructed in Enka, North Carolina, that year and Southeastern began shipping bottles in October, 1982. *Id.*

Southeastern sells plastic bottles to its owner-members. Southeastern does not supply containers to Pepsi or Royal Crown bottlers, or to purchasers of non-beverage containers. Sewell Adm. 17.1. Furthermore, "Southeastern does not sell to non-member [Coke] bottlers nor does it allow its members to re-sell empty bottles to non-member bottlers." Plaintiff's response, Tab 1 at 101 (citing PTX 2307; PTX 3339); Defendants Adm. 208.

Plaintiff challenges several aspects of Southeastern's formation and operation as violative of federal antitrust law.

1. Southeastern's Supply Contracts.

The parties agree that a plastic beverage bottle production plant requires some minimum amount of volume to justify the investment in plant and equipment. Plaintiff's response, Tab 1 at 56. The parties dispute what minimum amount was necessary in 1982 to make self-manufacture economically viable and whether any one of the Bottlers could have engaged in self-manufacture alone. However, in deciding defendants' motion for summary judgment, this dispute is not material.

When Southeastern was formed in 1982, the stockholders invested $1.2 million of equity and guaranteed $6 million of debt. DTX 937, Exh. I. All of Southeastern's members signed supply contracts under which they agreed to purchase 80% of their two-liter plastic bottle requirements for five years. Defendants Adm. 46. After the initial five-year period, the supply contracts

allow cancellation "at any time by providing sixty (60) days written notice. . . ." *E.g.*, PTX 10,117. Some of the Bottlers signed the supply contracts before Southeastern was capable of making and delivering bottles. Defendants Adm. 49.

Long-term supply contracts for such a significant portion of a bottler's requirements were common in the plastic bottle market prior to the formation of Southeastern. Between 1977 and 1981, the majority of Sewell's plastic beverage bottles were sold pursuant to three-year and/or five-year supply contracts with its customers. Sewell Adm. 7.5. Between 1978 and 1982, Sewell entered into five-year supply contracts with more than 50 of its customers. Sewell Adm. 7.4 Amoco, Owens-Illinois, Hoover and Continental also have used three-year and/or five-year plastic beverage bottle supply contracts. Sewell Adm. 7.16. Plaintiff does not dispute that Western Container's members entered into supply contracts with Western under which they agreed to purchase at least 80% of their two-liter plastic bottle requirements for ten years and that Southeastern used those contracts as models for its supply contracts. Plaintiff's response, Tab 1 at 78.

Sewell complains of efforts made by Southeastern to hold its members to their contractual agreement to purchase 80% of their requirements of certain types of bottles from Southeastern. There is evidence that in 1984, Southeastern *considered* imposing penalties on Asheville Coke and Coke United if they failed to comply with their supply contracts with Southeastern. Nash dep. at 369-71; Perry dep. at 485-93.

Plaintiff also contends that Anderson Coke was threatened with a $2,000 per truckload penalty if they purchased bottles from other suppliers. Plaintiff's response, Tab 1 at 95 (citing PTX 1044; PTX 1020; Merchant dep. at 37-38, 57; Dunagan dep. at 495-97). The evidence cited by plaintiff does not state or suggest that

Anderson Coke was "threatened" with a penalty in the amount of $2,000 (or any other amount) per truckload. The only reference to $2,000 appears in PTX 1020, a letter dated January 24, 1983, from Edward T. Mizell, President of Southeastern, to Walter Bratcher of Anderson Coke, which in pertinent part reads as follows:

> [E]ach load that Member Bottlers purchase from someone other than Southeastern, costs the project approximately $2,000. Therefore, we need every member's full support and participation, if we are to continue to progress and do the job for which this project was established.

The court declines to find that discussion of liquidated damages or of requesting a stated sum for violation of an otherwise lawful contract is a violation of the antitrust law or unfair trade practice law. There is, in fact, an obligation under the law to abide by lawful contracts even though those contracts may later be viewed by the accountants as unprofitable and by the executive officers as uncomfortable. Moreover, Southeastern's board of directors had a fiduciary obligation to enforce the supply contracts. A demand that an otherwise lawful contract be respected and complied with does not convert the contract into an unlawful agreement.

2. Freight Equalization.

Southeastern's member bottlers (within a 300-mile radius of Asheville, North Carolina) pay the same price for bottles purchased from Southeastern, including delivery. Defendants Adm. 57. The use of a delivered price equalizes the freight costs among the Bottlers, "so that no owner-bottler would enjoy a lower transportation cost by reason of its geographic proximity to Southeastern." Docket No. 146 at 7 (May 6, 1988, order). A Sewell competitive information report, dated October 31, 1985, states that Carolina Packaging quoted delivered prices to its members in a mailing on October 23, 1985,

and that "[f]reight costs are divided equally among the membership." DTX 1787.

3. Southeastern's Price Competition Clause.

The Bottlers were obligated to accept Southeastern's set price for the first year of their supply contract. After the first year, a member-bottler could purchase any percentage of its requirements elsewhere if it proved that two other suppliers offered lower prices over a six month period and Southeastern was unable to meet the average of the two lower prices within sixty days. *E.g.*, PTX 10,117. Sewell's contracts normally required it to meet a lower price by a "reputable supplier" or allow the bottler to purchase elsewhere. However, by 1981, Sewell's contracts began to exclude "inplant production, bottle co-op organization and self-manufacturing" from their definition of "reputable supplier." *E.g.*, DTX 3272 at 3.

There is ample evidence from Sewell's internal documents that it considered and pursued a strategy of offering pricing concessions to certain of the defendant Bottlers in order to make the "investment of self-manufacture unattractive" and prevent "South Atlantic Canners from obtaining the necessary volume to support machinery." DTX 816. *See also* DTX 790; DTX 865.

D. Competition *Increased* After Southeastern Was Formed.

2. *Plastic Bottle Prices Decreased.*

Southeastern's computer records reflect the following invoice prices for two-liter bottles (per thousand, delivered) to its member-bottlers from 1982 through 1986:

October 1982	\$220
March 1983	\$210
April 1983	\$205

June 1983	$195
September 1983	$190
April 1984	$170
January 1985	$166
May 1985	$156
May 1986	$146

Stipulation A, para. 1. Southeastern's invoice prices are subject to year-end adjustments. Southeastern's computer records reflect that Southeastern has never increased invoice prices (which are subject to year-end adjustment) in its history. *Id.*

It is undisputed that: (1) Sewell's prices in the Southeast area for two-liter bottles have declined from 1982 through 1986; (2) Sewell's prices for three-liter and 16-ounce bottles have declined through 1986; and (3) prices of other suppliers in the market also have declined. Plaintiff's response, Tab 1 at 90-91. For example, Sewell's average bare bottle price to customers of its three plants in the Southeast area for two liter bottles (per thousand) was $198.41 in 1984, $184.76 in 1985, and $173.39 in 1986. *See* PTX 14,001A (calculated from plaintiff's data submitted after March 28, 1989, by summing revenues from all plants and dividing by total unit sales). *See also* DTX 301, Table 4.4 (virtually identical calculation of Sewell's two liter bare bottle price from 1984 to 1986).

There is no evidence in the original summary judgment record of below cost pricing by Southeastern. Sewell's only *allegation* of below cost pricing, advanced for the first time *after* jury selection on March 23, 1989 (*see* Docket No. 218 at 138-39), involves the sale of certain three-liter bottles by Southeastern in 1985. It is undisputed that Southeastern began manufacturing three-liter bottles in January, 1985. Plaintiff's response, Tab 1 at 119. Without regard to the reasonableness of the projection, it is also undisputed that Southeastern had projected three-liter sales of 43 million bottles in 1985

at a projected average total cost of $187 per thousand. *Id.*; DTX 4007. At the end of February, 1985, sales of three-liter bottles were well below the projection, total cost was $205 per thousand and Southeastern's total costs for three-liter bottles exceeded total revenues by $105,000. DTX 4008. However, in March, 1985, revenues exceeded total three-liter costs (PTX 3124), and from March through December 1985, three-liter revenues exceeded costs by $70,000, leaving a 1985 year-end deficit of only $35,000. DTX 4007. In 1986, three-liter revenues exceeded total costs by $315,000. PTX 4263. There is no evidence that the sales in January and February, 1985, were made below Southeastern's incremental or variable costs. Nor is there evidence that the costs associated with production of three-liter bottles impaired Southeastern's profitability on its three product lines as a whole; in 1985, Southeastern had overall pre-tax earnings of $900,000. PTX 3415 at Exhibit B.

Plaintiff contends that from 1982 through 1986, PET resin prices were a factor in declining plastic bottle prices. Plaintiff's response, Tab 1 at 91, 93 (citing PTX 14,120 (Sewell's resin costs from 1979 to 1986)). Because "[s]uppliers have no control over resin prices," Sewell contends that any decreases in plastic bottle prices which correspond to decreasing resin prices were not caused by the formation and operation of Southeastern. Plaintiff's response, Tab 1 at 91-92. The court of course agrees that the formation and operation of Southeastern is not the *sole* cause of the decrease in plastic bottle prices from 1982 to 1986.

2. *Production of Plastic Bottles Increased Substantially (More than Double).*

The parties adopted different theoretical methods of measuring output of plastic bottles in the Southeast area.

Plaintiff focuses on sales and defendants focus on production. However, the actual data compiled by the par-

ties for sixteen ounce/half liter bottles, two liter bottles and three-liter bottles, set forth in Tables 1-3, is virtually identical. Thus, the court finds that there is no genuine dispute as to the material facts regarding output in the relevant market. Because defendants' analysis of the data is more complete (they set forth data on output of one liter bottles supplied to them by Sewell and then aggregate across different bottle sizes by converting the data into "equivalent cases"[4]), the court will refer to defendants' results as set forth in Table 4.

Total output of plastic bottles in the relevant market has increased substantially every year from 1981 to 1986. Total output increased from 128.60 million equivalent cases in 1981 to 305.18 million equivalent cases in 1986, an increase of 137%. Also, total output in the relevant market by suppliers other than Southeastern also increased every year from 1981 to 1986. *See* Table 4.

3. *Market Concentration Has Decreased.*

The parties stipulated that the number of suppliers with manufacturing plants located in the relevant market has remained the same since the formation of Southeastern through the end of 1987. "In 1982, prior to the start of Southeastern's shipments of plastic beverage bottles in or about October 1982, there were five companies having plants physically located in the "Southeast area" which manufactured plastic beverage bottles: Sewell, Carolina Packaging, Amoco, Incon, and Owens-Illinois. In 1983, two former employees of Sewell, John Peacher and Rick Schwank, formed PSF and acquired Icon's plant in Columbia, SC. As of December 31, 1986,

[4] "Equivalent cases" is a standard measure in the soft drink industry which allows aggregation across different bottle sizes. The unit of measure is a 192 fluid ounce case, so that a 16 ounce bottle is .0833 equivalent cases, a two liter bottle is .3522 equivalent cases, a three liter bottle is .5283 equivalent cases and a one liter bottle is .1761 equivalent cases.

there were six companies having plants physically located in the 'Southeast area' which manufactured plastic beverage bottles: Sewell, Southeastern, Carolina Packaging, Amoco, PSP, and Owens-Illinois. In 1987, PSP was sold to Johnson Controls, and Constar (Sewell's parent company) purchased four of Owens-Illinois' plastic soft drink bottle manufacturing plants, including its one plant in the Southeast area (Birmingham, Alabama). As of December 31, 1987, there were five companies having plants physically located in the Southeast area: Sewell, Southeastern, Carolina Packaging, Johnson Controls, and Amoco." Stip. A para 2.

Market concentration has *de*creased since Southeastern was formed. In 1981, before Southeastern's formation, Sewell had a 50.7% share of the Southeast area market and the top four companies were responsible for 93.7% of total output. In 1986, the largest producer was Southeastern with a 33.5% share, Sewell had a 28.9% share, and the top four companies were responsible for 86.2% of total output. *See* Table 4. The Herfindahl-Hirshman Index ("HHI"), a measure of market concentration derived by summing the squares of the market shares of the individual competitors, decreased from 3321 in 1981 to 2359 in 1986. DTX 301, Table 7.B.1.i. *See F.T.C. v. PPG Industries, Inc*, 798 F2d 1500, 1503 (DC. Cir. 1986) (HHI considered to be the superior measure of market concentration).

4. *Retail Soft Drink Prices Have Decreased.*

Plaintiff states that "average retail soft drink prices to the consumer in two and three liter plastic bottles declined from 1982 to 1986 *throughout* the United States." Plaintiff's response, Tab 1 at 103 (citing PTX 6014 at Table 16). Plaintiff does not dispute that: (1) average retail prices for soft drinks to the consumer in two and three liter plastic bottles, in the Southeastern United States as defined by A.C. Nielsen Co. (which is not the

same as the "Southeast area" market alleged by Sewell), declined from $3.53 per equivalent case in 1982 to $3.27 in 1986, and (2) in Nielsen's Southeastern United States market, the average price for two-liter Coca-Cola brands declined from $1.31 per bottle in 1982 to $1.24 in 1986. Plaintiff's response, Tab 1 at 102-03; DTX 302 at Tables 2.1, 4.2, 5.1. Although this decision does not depend upon a causal connection between the formation of Southeastern and lower soft drink prices, it is true that lower soft drink *bottle* prices facilitate lower retail soft drink prices.

5. *Production Costs Have Decreased.*

Plaintiff states that "[p]roduction costs for plastic soft drink bottles were declining before Southeastern was formed." Plaintiff's response, Tab 1 at 106 (citing PTX 14,120; O.J. Peacher aff. dated April 10, 1989, at ¶ 10). Production costs have continued to decline *since* Southeastern was formed. For example, Sewell's standard cycle time for production of plastic bottles steadily decreased from 1977 through January, 1986. PTX 14,120, Table 7. Various Sewell internal documents state that Sewell must continue to reduce production costs in order to compete with cooperatives. *E.g.*, DTX 1515; DTX 1694; DTX 1763; DTX 1796; DTX 1807; DTX 1998.

2. *Spending for Research and Development Does Not Appear to Have Been Substantially Affected.*

It is undisputed that certain companies have decreased research and development expenditures; they got out of the plastic bottle making business! Plaintiff's response, Tab 1 at 108. However, the evidence does not support a finding that overall research and development expenditures have decreased or increased. Since Southeastern was formed, new bottle sizes and types have been introduced in the market and as discussed, *supra*, production processes have become more efficient.

7. *Quality and Service Have Not Substantially Changed.*

There is evidence that Southeastern has at times experienced quality problems with its bottles. However, the evidences does not support a finding that *overall* quality or *overall* service in the market has declined since the formation of Southeastern. A Sewell internal document suggests that competition from cooperatives has provided an impetus for Sewell to improve the quality of its bottles. DT 1763 at 2.

8. *Choice of Consumers as to the Kind of Bottle They Like to Buy Their Coke in Is Not Shown To Be a Material Element in the Case.*

Because the Coca-Cola bottlers sell products of The Coca-Cola Company in exclusive territories, the decision by a Coke bottler to sell its product in a certain type of package will necessarily deprive consumers in its territory of choice to buy Coke products in a different type of package. Sewell argues that by choosing to sell its products in the one-piece bottle manufactured by Southeastern, the Bottlers "forfeited the consumers' indisputable preference for the two-piece bottle." Plaintiff's response, Tab 1 at 112. Although there is evidence that in some surveys consumers, *other things being equal,* preferred the two-piece bottle with a base cup to the one-piece "petaloid" design, there is no evidence that consumers prefer a two-piece bottle over a *less expensive* one-piece bottle.

9. *Defendants Do Not Have "Market Power."*

Plaintiff does not allege that Southeastern has *the ability to sell its bottles at prices above those that would be charged in a competitive market.* Southeastern's share of the Southeast area market was 33.5% in 1986. *See* Table 4. Since Southeastern seeks to produce bottles only for Coca-Cola bottlers (Sewell Adm. 17.1), and plaintiff contends that Southeastern already "controls virtually every

Coca-Cola bottler within its market" (Plaintiff's response, Tab 1 at 123), it seems unlikely that Southeastern will increase its market share materially in the future. According to Sewell's economists, the Coca-Cola bottler defendants had a 40% share of the soft drink market in the Southeast area in 1986. PTX 14,107. Thus, if Southeastern began to supply 100% of those Bottlers' requirements, its share of the plastic bottle market would only grow to approximately 40%.

Even with a 40% market share, there is no evidence that Southeastern would be able to increase prices profitably above the competitive level. Sewell's 1987 acquisition of Owens-Illinois gave Sewell a 39.2% share of the Southeast area market (based on 1986 data. *See* Table 4. Sewell's president testified that competition from other suppliers would prevent Sewell from increasing prices as a result of the acquisition. Nickels dep. at 293-94. Thus, there is no reason to infer market power solely on the basis of Southeastern's 1986 market share or its potential market share if it supplied all of the Bottlers' requirements. This conclusion is reinforced by plaintiff's argument that in 1981, when Sewell had a *50%* market share and the Southeast area market was more concentrated, Sewell was forced to meet lower price offers made to its customers by other suppliers. Furthermore, there is no evidence that Southeastern could charge supracompetitive prices if it attempted to increase its market share by selling plastic bottles to bottlers other than Coke bottlers. During the March 22, 1989, reargument, plaintiff's counsel admitted that since the formation of Southeastern, Sewell and the other competitors in the Southeast area market "fight like cats and dogs" on price, service and quality for the business of plastic bottle purchasers in the Southeast area other than the defendant Bottlers. Docket No. 205 at 40-41. Given the strength of Sewell and the other "major" players in the Southeast area market (such as Amoco and Johnson Controls, *see* Docket No. 205 at 36-37), the court finds no reason to believe that

Southeastern could overcome the "cat and dog" competition and charge a price above the competitive level.

Plaintiff has consistently argued that defendants have engaged in a buyer price-fixing conspiracy, in which the object is to depress market prices below the competitive level through combined purchasing power. In the complaint plaintiff alleges that:

> 19. Sometime in 1981, a number of the bottler defendants, encouraged by Coke, sought to fix the price at which they purchased plastic beverage bottles at lower than free market prices. Those defendants attempted to coerce lower bottle prices from their major supplier, Sewel, by threatening Sewell that if it failed to meet their demands, they would form their own captive manufacturer, which would foreclose Sewell from competing from their business for the foreseeable future.
>
> 20. Sewell did not agree to the bottlers' demands. True to their threats, the bottlers—assisted by defendant Coke and one or more persons affiliated with another Coke co-operative, Western Container of Texas—undertook the formation of a collective manufacturing enterprise, which ultimately became Southeastern. The purpose and intent in forming Southeastern was to lock out Sewell and other plastic beverage bottle suppliers out of the Coke-bottler business in the areas where the bottlers were located.

The complaint itself casts doubt on plaintiff's theory that the Bottlers as a group of buyers possess market power, because it acknowledges that Sewell *rejected* the Bottlers' requests for lower prices.

Plaintiff now alleges that the Bottlers "successfully obtained *lower-than-market* price *offers* from Sewell through combined purchasing power" before the formation of Southeastern." Plaintiff's response, Tab 1 at 122 (emphasis added). The evidence regarding two offers

made by Sewell to the Bottler does not support this allegation.[5] First, there is evidence in the record that Sewell was charging at least one other customer, Atlantic Pepsi, less than it offered to charge the South Atlantic Canners group after the meeting at Litchfield Beach Inn on July 31, 1981. *See* Docket No. 224 at Addendum B (citations collected therein). Second, Sewell admits that in March 1982, it offered "the South Atlantic Canners group a price of $220 per thousand for two-liter bottles (58 gram) on a bulk unlabelled basis, f.o.b. Sewell's plant, if the group would commit at least 40 to 42 million bottles annually to Sewell for a period of three years." Sewell Adm. 13.5. Sewell also admits that in March, 1982, it "entered into an agreement to sell two-liter plastic bottles (58 gram) to Atlanta Coke at $210 per thousand on a bulk unlabelled basis, f.o.b. Sewell's plant." Sewell Adm. 13.7.

---

[5] Plaintiff alleged that the Bottlers specifically demanded a price of $200 per thousand bottles during a meeting at the Litchfield Beach Inn. Docket No. 102A at 10. The court accepted this allegation as a fact in the May 6, 1988, order. Docket No. 146 at 6. Plaintiff has renewed this allegation. Plaintiff's response, Tab 1 at 125. Defendants have urged the court to review this finding. Docket No. 246 at 16.

The court has reviewed the material cited by plaintiff in support of its allegation. *See* PTX 280; Endres dep. at 401-05; 446-47; Maffeo dep. at 156-57; Stewart Dep. at 218-21. The evidence simply do not support the assertion that the Bottlers demanded a specific price of $200. First, there is no direct evidence, documents or testimony, about a specific price demand of $200. There is evidence that the Bottlers knew that Western Container reported a two liter manufacturing cost of $200 per thousand. PTX 280. One of Sewell's witnesses, a participant in the meeting, testified that: (1) Sewell made an initial offer which was rejected; (2) Sewell made a second, lower offer which was rejected; (3) he "believe[s] that they were comparing the price [Sewell offered] to what Western Container was manufacturing for"; and (4) Sewell's lower offer apparently was rejected because it was higher than Western Container's manufacturing cost. Endres dep. at 401-05. The testimony does not properly give rise to the inference that the Bottlers demanded that Sewell offer them a price of $200. Thus, the court vacates its prior finding of Sewell's allegation as a fact.

Not surprisingly, Sewell further admits that the price to Atlanta Coke was less than the price offered to the members of South Atlantic Canners as a group. Sewell Adm. 13.9. Thus, there is simply no evidence that the Bottlers received offers from Sewell below prices being offered to others in the Southeast area and, in any event, no allegation that the offers made by Sewell would have been sales below cost or otherwise unprofitable.

10. *Effect on Competitors.*

After joining Southeastern, the Bottlers have, in the aggregate, purcased over 17%, over $23.8 million, of their total dollar purcases of plastic bottles through 1986 from Sewell. Sewell Adm. 11.2, 11.3. The final data compiled by defendants for use at trial confirms these admissions. DTX 301, Table 8.B.1.

Sewell is the largest producer of plastic soft drink containers in the country. Sewell Adm. 15.1. Sewell has made a profit on its plastic container operations every year since 1977. Sewell Adm. 15.2. From 1978 through 1986, Sewell's return on net operating assets exceeded 16% in every year except 1984. Sewell Adm. 15.3. For the twelve months ending November, 1986, Sewell's return on net operating assets was 23.78%, which exceeded its projection for 1986 of 20.1%. Sewell Adm. 15.4.

Allthough there is not specific data on the profitability of other competitors, there is evidence that after the formation of Southeastern: (1) Incon went out of business and its plant was acquired by PSP; (2) PSP was sold to Johnson Controls; and (3) Constar (Sewell's parent) purchased Owens-Illinois' plant in the Southeast area. Stip. A para. 2. Sewell admits that the Owens-Illinois plants acquired by Constar had been profitable when operated by Owens-Illinois. Sewell Adm. 16.3. Sewell also admits that PSP's sales and profits increased each year from 1983 to 1987. Sewell Adm. 16.7.

During the March 22, 1989, reargument, the court engaged plaintiff's counsel in the following dialogue:

> COURT: Let me ask another question about that. Was anybody else pushing to invade or take over or get into this market besides the parties to this case?
> PLAINTIFF'S COUNSEL: Absolutely.
> COURT: Has there been any other big operator in this market except these two during the pertinent period?
> PLAINTIFF'S COUNSEL: Yes. There was well before Southeastern ever came along.

Docket No. 205 at 36.

Johnson Controls is the second largest merchant supplier of plastic beverage bottles in the country. *See* Sewell Adm. 16.1. Johnson Controls' stated reason for purchasing PSP was a desire to have a manufacturing plant for plastic beverage bottles in the Southeast area. Sewell Adm. 16.9. In fact, when Constar purchased the four plants from Owens-Illinois in 1987, Johnson Controls was also interested in acquiring those plants. Sewell Adm. 16.2.

IV. CONCLUSIONS OF LAW

A. Reconsideration of Defendants' Motion for Summary Judgment.

The May 6, 1988, partial denial of defendants' motion for summary judgment was an interlocutory order. *Bon Air Hotel, Inc. v. Time, Inc.*, 426 F.2d 858, 862 (5th Cir. 1970). "[B]ecause the order was interlocutory, 'the court at any time before final decree [could] modify or rescind it.'" *Id.* (quoting *John Simmons Co. v. Grier Brothers Co.*, 258 U.S. 82, 88 (1922)); *Lindsey v. Dayton-Hudson Corp.*, 582 F.2d 1118, 1121 (10th Cir.), *cert. denied*, 444 U.S. 856 (1979); Fed.R.Civ.P. 54(b) Thus, vacating the May 6, 1988, order was within the court's power and is

reviewed under an abuse of discretion standard. *Bon Air*, 426 F.2d at 862 (citing *Marconi Wireless Telegraph Co. v. United States*, 320 U.S. 1, 47-48 (1943)).

The court was "free in its discretion to grant a reargument based either on all the evidence then of record or only evidence before the court when it rendered its interlocutory decision, or to reopen the case for further evidence." *Marconi*, 320 U.S. at 48. Even if no new material is presented, reconsideration of a previously denied summary judgment motion is proper because "the court was not bound to perpetuate error if it later believed it had committed such." *Burns v. Massachusetts Institute of Technology*, 394 F.2d 416, 418 (1st Cir. 1968); *Lindsey*, 592 F.2d at 1121.

Plaintiff claims that the court committed error by requiring reargument on defendants' motion for summary judgment on less than ten days notice. Plaintiff's objection is groundless. The court had the power to call for reargument on the basis of the evidence before the court when it initially denied defendants' motion. Unless plaintiff is conceding that the original summary judgment record was inadequate to support the court's initial decision to set this case for trial, the court certainly was not required to give plaintiff ten days to prepare to reargue, on the existing record, a motion filed 16 months earlier and argued twice before. However, even if the court did not give plaintiff adequate time to prepare for reargument, any prejudice to plaintiff has been cured by the court's willingness to consider all materials filed by the parties after the court announced its intention to grant defendants' motion for summary judgment on March 28, 1989. *See Barney v. I.R.S.*, 618 F.2d 1268, 1271 n.8 (8th Cir. 1980) (failure to give plaintiff opportunity to respond required by Fed.R.Civ.P. 56(c) substantially cured by reconsidering decisions in light of additional materials submitted by plaintiff).

B. The Standard for Summary Judgment.

Summary judgment is appropriate when "there is no genuine issue as to any material fact" and "the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c).

Plaintiff Sewell has the burden of proof at trial on each and every element of its claims under the federal antitrust laws and the North Carolina Unfair Trade Practices Act. The Supreme Court has stated that:

> In our view, the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be 'no genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. The moving party is 'entitled to a judgment as a matter of law' because the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof."

Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986). However, the Supreme Court in *Celotex* continued by stating that:

> Of course, a party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact.

477 U.S. at 323. The court concludes that defendants have met their initial burden of production under Rule 56.

The Supreme Court, in another antitrust case, explained the next step in the summary judgment process.

> When the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts. In the language of the Rule, the nonmoving party must come forward with 'specific facts showing that there is a *genuine issue for trial.*' Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.'
>
> It follows from these settled principles that if the factual context renders respondents' claim implausible—if the claim is one that simply makes no economic sense—respondents must come forward with more persuasive evidence to support their claim than would otherwise be necessary.

Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586-87 (1986) (citation and footnotes omitted).

Sewell contends that defendants' "purpose and intent in forming Southeastern was to lock Sewell and other plastic beverage bottle suppliers out of the Coke-bottler business in the areas where the bottlers were located." Complaint para. 20. This claim makes no economic sense in the factual context of this case, because Sewell cannot explain how the Bottlers would benefit in a way prohibited by the antitrust laws (*i.e.*, earning monopoly profits) by forming a corporation to manufacture plastic bottles for sale to themselves. Because the Bottlers' profits ultimately derive from the sale of soft drinks packaged in plastic bottles, the Bottlers have no economic incentive to invest in a cooperative manufacturing enterprise and "lock out" existing suppliers if that will raise

the cost of an input such as the plastic bottle to themselves. Once the decision to invest is made, the Bottlers do have an economic incentive to cause their cooperative manufacturing enterprise to produce plastic bottles of the highest quality at the lowest possible price.

As plaintiff points out, when Southeastern was formed it "used the same basic technology . . . generally in use in the industry." Plaintiff's response, Tab 1 at 106. Thus, assuming that Southeastern would experience economies of scale similar to its competitors, one would expect Southeastern to be as efficient as its competitors and produce a bottle of the same or similar quality. Because Southeastern only sells bottles to its owner-members, there is no economic incentive for Southeastern to sell bottles at any price other than a price at or slightly above its total cost of production (including, for example, research and development expenditures). Selling at a price below cost would simply require the Bottlers to make capital contributions to Southeastern in the amount of any loss, offsetting any aggregate benefit from the lower prices charged to the Bottlers. Selling at a price very much above the actual cost of production would increase the effective price of bottles by causing Southeastern to earn high profits, which could not simply be distributed back to the Bottlers as dividends because they would first be subject to the corporate income tax. Thus, as an efficient producer pricing its product at or just above its costs, one would expect the entry of Southeastern in the market to have a *pro*competitive impact. The facts of this case confirm that expectation.

Although plaintiff's claim is rendered implausible by the factual context of this case, the court has not required plaintiff to make a more persuasive showing because plaintiff has simply failed to come forward with specific facts to support a finding that competition has been adversely affected.

C. Claims Under Sherman Act § 1.

Section 1 of the Sherman Act of 1890 provides that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." 15 U.S.C. § 1 (1982). Every commercial agreement restrains trade. *Chicago Board of Trade v. United States*, 246 U.S. 231, 238 (1918). Rejecting a literal interpretation of the statute, the Supreme Court has repeatedly emphasized that the legality of an agreement depends on whether it is adjudged to be an unreasonable restraint on trade. *National Collegiate Athletic Association v. Board of Regents of University of Oklahoma*, 468 U.S. 85, 98 (1984).

Since the decision in *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1 (1911), restraints have been analyzed under the "rule of reason" unless the "challenged action falls into the category of 'agreements or practices which because of their pernicious effect on competition and lack of any redeeming value are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use." *Northwest Stationers v. Pacific Stationery*, 472 U.S. 284, 289 (1985) (quoting *Northern Pacific R. Co. v. United States*, 356 U.S. 1, 5 (1958)). Plaintiff claims that defendants' practices are illegal under both the *per se* approach and the rule of reason.

1. *Per se* Violations.

Whether to apply the *per se* rule depends on "whether the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output . . . or instead one designed to 'increase economic efficiency and render markets more, rather than less, competitive.'" *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1, 19-20 (1979)

(quoting *United States v. United States Gypsum Co.*, 538 U.S. 422, 441 n.16 (1978)). In the order of May 6, 1988, the court thoroughly discussed and rejected plaintiff's claims that defendants have committed *per se* violations of Section 1 of the Sherman Act. Docket No. 146. The court adheres to that determination.

2. Rule of Reason.

"[T]he rule of reason requires the factfinder to decide whether under all the circumstances of the case the restrictive practice imposes an unreasonable restraint on competition." *Arizona v. Maricopa County Medical Society*, 457 U.S. 332, 343 (1982). Judge Breyer has pointed out that " 'unreasonableness' in antitrust law has a rather special meaning. It means that the anticompetitive consequences of a particular action or arrangement outweigh its legitimate business purposes." *Interface Group, Inc. v. Mass. Port Authority*, 816 F.2d 9, 10 (1st Cir. 1987) (citing 7 P. Areeda, Antitrust Law ¶ 1500, at 362-63 (1986)). The necessary implication of such a balancing test is that "[w]ithout a showing of actual adverse effect on competition, [one] cannot make out a case under the antitrust laws. . . ." *Jefferson Parish Hospital Dist. No. 2 v. Hyde*, 466 U.S. 2, 31 (1984).

Judge Breyer also noted that the term "anticompetitive" also has a special meaning in antitrust law. *Anticompetitive actions* are not those "that merely injure competitors, but [are] *actions that harm the competitive process*, a process that aims to bring consumers the benefits of lower prices, better products and more efficient production methods." *Interface Group*, 816 F.2d at 10 (citations omitted and emphasis added). Plaintiff has failed to prove that defendants' actions have harmed or will harm the competitive process. Since the formation of Southeastern through 1986, plastic bottle prices have decreased, output of plastic bottles has increased, the number of competitors has remained the same, market concentration has decreased, and production processes

have become more efficient. At best, plaintiff has shown that Southeastern has at times experienced quality problems with its bottles and that certain companies have decreased research and development expenditures. However, plaintiff has not produced evidence of a decline in overall plastic bottle quality or research and development expenditures in the market as a whole.

Plaintiff has not produced any legally sufficient evidence of predatory pricing by Southeastern. Plaintiff's only allegation of predatory pricing, which was not made as part of the original summary judgment record, involves the sale of three-liter bottles by Southeastern in 1985. The Supreme Court has not yet reached a consensus on the proper definition of predatory pricing in the antitrust context. *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 117 n.12 (1986). However, leading commentators and several circuits presume that prices below reasonably anticipated marginal cost are predatory. *Northeastern Tel. Co. v. AT&T*, 651 F.2d 76, 88 (2d Cir. 1981), *cert. denied*, 455 U.S. 943 (1982) (citations collected therein). Because marginal cost cannot be determined from conventional accounting methods, average variable cost is used as a surrogate. *Id.* Plaintiff has not produced evidence that Southeastern's sales of three-liter bottles in 1985 were below its marginal or average variable costs. Furthermore, because competitors in the Southeast area sell a full line of plastic beverage bottles, the court holds that three-liter bottles alone cannot be considered a relevant product for purposes of predatory pricing analysis. The relevant product must be defined with reference to the danger of predatory pricing. The danger of predatory pricing is that rivals will be driven out of the market. In this case, "[t]he pricing of one size at a predatory level would not necessarily drive out rivals who were selling a full line . . . unless this placed the overall price of the line at the predatory level." *Janich Bros., Inc. v. American Distilling Co.*, 570 F.2d 848, 856 (9th Cir. 1977), *cert. denied*, 439

U.S. 829 (1978). *Accord Bayou Bottling, Inc. v. Dr. Pepper Co.*, 725 F.2d 300, 305 (5th Cir.), *cert. denied*, 469 U.S. 833 (1984). Thus, although pricing below average total cost also might be considered predatory, the evidence in the record demonstrates that Southeastern's revenues from its full product line exceeded its costs in 1985.

Plaintiff has failed to prove that Southeastern or the Bottlers possess market power. "Market power is the ability to raise prices above those that would be charged in a competitive market." *NCAA*, 468 U.S. at 109 n.38. Market power cannot be determined by market share alone. *Indian Grocery, Inc. v. Super Valu Stores, Inc.*, 864 F.2d 1409, 1414 (7th Cir. 1989). In this case there is no evidence that Southeastern has raised or could raise market prices above the competitive level or, conversely, that the Bottlers could depress market prices below the competitive level. Without evidence of market power, there is no basis for finding "undue" foreclosure of the relevant market. *See Alberta Gas Chemicals Ltd. v. E. I. duPont de Nemours & Co.*, 826 F.2d 1235, 1244-46 (3d Cir. 1987), *cert. denied*, 108 S.Ct. 2830 (1988); 4 P. Areeda & D. Turner, *Antitrust Law* ¶ 1004 at 221 (1980).

If plaintiff had made a showing of actual adverse effect on competition, then under the rule of reason the "court must consider whether there are any procompetitive justifications for the use of the . . . restriction at issue." *Chuck's Feed & Seed Co., Inc. v. Ralston Purina Co.*, 810 F.2d 1289, 1294 (4th Cir.), *cert. denied*, 108 S.Ct. 94 (1987). In considering whether a restraint or restriction is reasonable, the court should consider whether there are less restrictive means of achieving any procompetitive benefits.

Southeastern's supply contracts are reasonably justified means of achieving legitimate, procompetitive purposes. The Supreme Court recognized long ago that "re-

quirements contracts . . . [are] of particular advantage to a newcomer to the field to whom it is important to know what capital expenditures are justified [because they] offer the possibility of a predictable market." *Standard Oil Co. v. United States*, 337 U.S. 293, 306-07 (1949). Southeastern's supply contract recites "that in order for [Southeastern] to become a successful operation, [Southeastern] must be assured of a ready market for its products." PTX 685. Sewell argues that the supply contracts were "not signed to 'support' the investment" and "were not needed for the investment," because "the signing of the supply contracts contravened the prevailing practices in the industry in 1982." Plaintiff's response, Tab 1 at 60. Even if we assume that purchasers of plastic bottles were not willing to sign supply contracts with *established* suppliers in 1982, that assumption does not make it unreasonable for buyers to sign such contracts with a potential entrant to the market. This is particularly true where, as in this case, the buyers have a financial interest in the newcomer.

There is no evidence that Southeastern's sales of plastic bottles to the Bottlers at the same delivered price is unjustified. The use of a delivered price equalizes freight costs among the Bottlers. In the absence of a delivered price, each of the Bottlers would have had an economic incentive to require that Southeastern's manufacturing plant be located close to it. Thus, use of a delivered price eliminated any advantage from being located relatively near the plant. This removed a potential obstacle to the formation of Southeastern and had plausible utility in attracting investors to the enterprise, thereby increasing volume and reducing Southeastern's marginal cost of production.

The "price competition" clause in Southeastern's contracts is reasonably justified. Requirements contracts need not contain price competition clauses to be reasonable. Here, there was no significantly less restrictive

means available to protect Southeastern from the perceived and ultimately actual threat of selective pricing to key member bottlers by a single established supplier such as Sewell in order to prevent the formation or disrupt the operation of Southeastern.

Plaintiff failed to set forth specific facts demonstrating an actual or probable adverse impact on competition. Therefore, plaintiff's claims under section 1 of the Sherman Act should be dismissed.[6]

---

[6] Sewell also claims that a joint arrangement, which began in the fall of 1985 and lasted through approximately 1987, for purchasing PET resin, among Southeastern and two other companies (Western Container and Apple Container), is illegal. The only mention of resin purchasing in the complaint charges The Coca-Cola Company with purchasing, "through an entity which it effectively controls, PET materials for Southeastern in combination with purchases for Coke's own operations, affording Southeastern an advantage in the purchase of PET materials which it otherwise would not enjoy." Complaint at para. 36, 51(d). Sewell contends that Coke is deemed to have "participated" through its ownership interest in one of the entities. However, the parties stipulated (Stip. A para. 30) that The Coca-Cola Company did not participate in the discussions in which the agreement to negotiate resin purchases was reached or in any ensuing negotiations for the purchase of resin on behalf of any of these three entities.

In the May 6, 1988, order, the court denied plaintiff's motion to declare the joint resin purchasing agreement to be illegal *per se* under Section 1 of the Sherman Act. Docket No. 146. On January 17, 1989, Sewell moved that the court clarify the May 6, 1988, order as it related to Sewell's *per se* resin price-fixing claim. Docket No. 184. This motion was heard on March 1, 1989. Since the court was preparing to try this action for six weeks, the court decided that it would hear plaintiff's evidence at trial under the rule of reason approach and address the legal issues on a motion for directed verdict. *See* Docket No. 196 (March 3, 1989, order). By letter to the court dated March 6, 1989, defendants objected to that ruling.

Plaintiff never moved to amend the complaint in order to allege that the joint resin purchasing agreement was illegal. Because resin sellers would be more directly injured by an illegal joint purchasing arrangement than other resin buyers, plaintiff may not have standing tp pursue such a claim. *See Cargill, Inc. v. Monfort*

D. Exclusive Dealing Claims.

Southeastern's supply contract is not an *exclusive* dealing arrangements on its face; the Bottlers are free to purchase 20% of their requirements from other suppliers such as Sewell. However, Section 3 of the Clayton Act applies to contracts that "do not contain specific agreements not to use the [goods] of a competitor," if "the practical effect . . . is to prevent such use." *United Shoe Mach. Co. v. United States*, 258 U.S. 451, 457 (1922)). The court need not resolve whether the practical effect of Southeastern's supply contracts is to prevent the use of other suppliers' goods. Assuming that the supply contracts are exclusive dealing arrangements, the court would analyze them under the rule of reason. *Chuck's Feed & Seed*, 810 F.2d at 1293-95.

For the reasons discussed, *supra*, plaintiff has failed to point out specific facts demonstrating a genuine issue of material fact for trial.

E. Sewell's Other Claims.

Sewell's other federal claims—unlawful acquisitions under Section 7 of the Clayton Act and attempted monopolization under Section 2 of the Sherman Act—require a

---

of Colorado, Inc., 479 U.S. 104, 111 n.6 (1986). More importantly, joint purchasing arrangements are not illegal unless the buyers collectively possess market power. Plaintiff has failed to set forth any facts (1) delineating the relevant product or geographic market and (2) demonstrating that the three entities collectively possessed market power in the relevant market. Disregarding what appear to be numerous valid objections by defendants, the only evidence offered by plaintiff in support of this "claim" simply demonstrates that after joint negotiations began, Southeastern obtained a lower price from a *single* supplier (American Hoechst) for a *different type of resin* than Sewell purchased from the same supplier from October, 1985, through February, 1986. Docket No. 235, Tab 7. Assuming that Sewell had standing to assert and had properly asserted a claim about the joint resin purchasing agreement, this proof is simply inadequate to support Sewell's "claim."

showing of actual or probable adverse effect on competition. 15 U.S.C. § 18 (barring acquisition of stock if the "effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly"); *International Distribution Centers, Inc. v. Walsh Trucking Co., Inc.*, 812 F.2d 786, 790 (2d Cir.), *cert. denied*, 482 U.S. 915 (1987) (element of Sherman Act § 2 claim is anticompetitive or exclusionary conduct). As discussed, *supra*, Sewell's evidence is insufficient to establish any actual or probable adverse effect on competition. Thus, these claims should be dismissed.

Plaintiff's claim under N.C. Gen. Stat. § 75-1, which forbids combinations in restraint of trade, should be dismissed for the reasons set forth in Section IV.C.2, *supra*. *Rose v. Vulcan Materials Co.*, 282 N.C. 643, 655 (1973) (law applying Sherman Act instructive in determining reach of § 75-1).

Plaintiff's claim under N.C. Gen. Stat. § 75-1.1, which forbids unfair and deceptive trade practices, also should be dismissed. The Fourth Circuit Court of Appeals has intepreted the *South* Carolina Unfair Trade Practices Act, which is very similar in language and scope to § 75-1.1, to require a showing of an adverse effect on competition when the claim is directed at anticompetitive (rather than unfair or deceptive) practices. *Chuck's Feed & Seed*, 810 F.2d at 1295-96. The Fourth Circuit cited with approval *Stearns v. Genrad, Inc.*, 564 F.Supp. 1309 (M.D.N.C. 1983), *aff'd on other grounds*, 752 F.2d 942 (4th Cir. 1984), which granted summary judgment on a claim under § 75-1.1 because plaintiff made no showing of an adverse effect on competition. 810 F.2d at 1295-96. Furthermore, on the facts presented, the court holds that plaintiffs claim under § 75-1.1 is insufficient as a matter of law. *Hardy v. Toler*, 288 N.C. 303 (1975) (whether practice is unfair or deceptive is a question of law for the court to decide).

Plaintiff's claim under N.C. Gen. Stat. § 75-5(b)(2), which is an exclusive dealing provision, should be dismissed for the reasons set forth in Section IV.D, *supra*. *Stearns*, 564 F. Supp. at 1318 (requiring showing of adverse effect on competition); Aycock, "Antitrust and Unfair Trade Practice Law in North Carolina—Federal Law Compared," 50 N.C.L. Rev. 199, 230 (1972) (requirements contracts which do not expressly forbid dealing in good of a competitor should be tested under the rule of reason).

Stearns holds that a showing of adverse effect on competition is required under N.C. Gen. Stat. § 75-5(b)(3), which forbids willful injury of "the business of any competitor or business rival in this State with the purpose of attempting to fix the price of any goods when the competition is removed." 564 F.Supp. at 1318. Thus, this claim should be dismissed.

Plaintiff's remaining state law claims, N.C. Gen. Stat. §§ 75-5(b)(1,7), are directed at alleged price-fixing by defendants. Section 75-5(b)(1) forbids buyer price-fixing conspiracies and § 75-5(b)(7) forbids price-fixing generally. In the May 6, 1988, order, the court held that defendants' activities were not illegal *per se* as price-fixing. Docket No. 146 at 17-20. That reasoning is equally applicable here. At most the Bottlers have set a price (through their representatives on Southeastern's board of directors) which will be charged to them by their joint venture. There is no evidence that defendants have "fixed" the price at which other suppliers in North Carolina sell plastic bottles or other bottlers in North Carolina purchase plastic bottles. The court holds that the facts set forth by plaintiff are not sufficient for a rational trier of fact to find that defendants violated §§ 75-5(b)(1,7).

F. "*Antitrust* Injury."

"To supplement enforcement of the antitrust laws, Congress has created private causes of action to recover treble

damages and obtain equitable relief. *See* 15 U.S.C. §§ 15, 26." *Alberta Gas,* 826 F.2d at 1239. "This additional avenue of enforcement, however, is not open to all who might be interested in punishing the wrongdoer or who have suffered some peripheral loss." *Id.*

The Supreme Court has limited private enforcement of the antitrust laws by construing the remedial provisions of the Clayton Act to require proof of "antitrust injury." In *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977), the Court held that plaintiffs seeking treble damages under § 4 of the Clayton Act, 15 U.S.C. § 15, must show more than simply an "injury causally linked to an illegal presence in the market"; instead "[p]laintiffs must prove *antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *Id.* at 489 (emphasis in original).

In *Brunswick*, plaintiffs were 3 of the 10 bowling centers owned by a relatively small bowling chain. The defendant, one of the two largest bowling chains in the country, acquired several bowling centers located in plaintiff's market that would have gone out of business but for the acquisition. Plaintiffs sought treble damages under § 4, alleging as injury the "loss of income that would have accrued had the acquired centers gone bankrupt." *Id.* at 487. The Supreme Court held that this injury, although causally related to a merger alleged to violate § 7 of the Clayton Act, was not an *antitrust* injury because "[i]t is inimical to the purposes of [the antitrust] laws to award damages" for losses stemming from continued competition. *Id.* at 488.

In *Cargill*, 479 U.S. 104, the Court held that in order to obtain injunctive relief under § 16 of the Clayton Act, 15 U.S.C. § 26, a private plaintiff must show a threat of antitrust injury. In *Cargill*, plaintiff, the country's fifth largest beef packer, brought an action to enjoin the pro-

posed merger of the second and third largest beef packers in the country. Plaintiff alleged that it was threatened with a loss of profits by the possibility that defendants, after the merger, would lower prices to a level at or above its costs in an attempt to increase market share. The Court held that "the threat of loss of profits due to possible price competition following a merger does not constitute a threat of antitrust injury." *Id.* at 117.

Plaintiff now claims that from 1983 through 1986 it lost $20.7 million in profits due to the loss of $101.2 million in sales to the Bottlers. PTX 14,000. Assuming plaintiff could prove that defendants' conduct violates one of the substantive provisions of the Sherman Act or the Clayton Act, plaintiff's lost sales to the Bottlers would be causally linked to the "illegal" formation and operation of Southeastern. However, it does not follow that Sewell's lost sales would have occurred by reason of that which made Southeastern's formation and operation illegal. *Brunswick,* 429 U.S. at 488 ("while respondents' loss occurred 'by reason of' the unlawful acquisitions, it did not occur 'by reason of' that which made the acquisitions unlawful").

Plaintiff's counsel admits that this "is not in antitrust parlance a predatory pricing case." Docket No. 218 at 138 (Trial Transcript, March 23, 1989). Sewell does not claim that its plastic bottle operations in the Southeast area have been unprofiable. Moreover, there is no evidence that if Southeastern had not been formed or that if it had been formed without the restraints challenged by Sewell, that Sewell would have retained the Bottlers' business from 1983 through 1986. "Mindful that antitrust law aims to protect competition, not competitors, we must analyze the antitrust injury question from the viewpoint of the consumer." *Alberta Gas,* 826 F.2d at 1241. Where, as here, the Bottlers and other consumers of plastic bottles in the Southeast area have benefitted from decreased, nonpredatory prices, to allow Sewell to

recover treble damages for lost sales to the Bottlers would be to allow a windfall.

Even if Sewell had set forth specific facts demonstrating an actual or probable adverse impact on competition, Sewell has failed to set forth specific facts demonstrating actual or threatened antitrust injury. Because Sewell would not be entitled to any relief, its federal claims should be dismissed. Under N.C. Gen. Stat. § 75-16, which establishes private causes of action and provides for treble damages, the North Carolina courts apply the standard of proximate cause articulated in federal antitrust cases. *American Rockwool, Inc. v. Owens-Corning Fiberglas*, 640 F.Supp. 1411, 1444 (E.D.N.C. 1986) (citing North Carolina Pattern Jury Instructions—Civil § 813.70). Thus, plaintiff's state law claims also should be dismissed for failure to prove antitrust injury.

V. EPILOGUE

Judge J. Dickson Phillips, writing for the Fourth Circuit Court of Appeals in *Pocahontas Supreme Coal Co. v. Bethlehem Steel*, 828 F.2d 211 (4th Cir. 1987), affirmed the district court's grant of summary judgment against an antitrust plaintiff, stating that:

> We think that the district court rightly adjudged that despite adequate opportunity to put a forecast of hard proof of its § 8 claim on the line, Pocahontas had not done so. In those circumstances a court need not withhold summary judgment, even in complicated cases such as antitrust, simply because there may remain 'some metaphysical doubt as to the material facts.' *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S.Ct. 1348, 1356, 89 L.Ed. 2d 538 (1986). The burden cast upon Pocahontas was to come forward with 'specific facts showing that there is a genuine issue for trial.' Fed.R.Civ.P. 56(e); it could not at this point rely only on its con-

> clusory pleading allegations to hold the case at issue. *See Matsushita*, 106 S.Ct. at 1356. The district court rightly perceived that on no more hard evidence than Pocahontas had put in the record no rational trier of fact, properly instructed in the substantive law and on the burden of proof, could find for Pocahontas on its § 8 claim, and that summary judgment was therefore appropriate. *See id.*

828 F.2d at 217.

There is a failure of proof in this action also. Despite adequate opportunity to put "on the line" a "forecast of hard proof" of an actual or probable adverse effect of defendants' activities on competition, Sewell has not done so. Even if Sewell had advanced "some" proof of anticompetitive effect, any restraints on trade arising out of defendants' formation and operation of Southeastern were reasonably necessary to achieve *pro*competitive benefits which clearly outweigh any anticompetitive effect. Finally, even if defendants' activities had violated the antitrust laws, Sewell has failed to prove that it sustained "antitrust injury" entitling it to monetary or injunctive relief.

Plaintiff's claims should be dismissed.

Defendant Southeastern is entitled to trial of its counterclaims.

An appropriate judgment will be entered.

This 25 day of August, 1989.

/s/ James B. McMillan
JAMES B. MCMILLAN
United States District Judge

TABLE 1

Output of 2-liter Plastic Bottles in Sewell's Market
1981-1986

	Plaintiff's Sales Data (millions of bottles)	Defendants' Production Data (millions of bottles)
1981		
Sewell	179.63	179.38
Owens-Illinois	64.12	69.97
Carolina Packaging	63.80	63.80
Amoco	23.31	23.31
Incon	23.00	23.00
SEC	NA	NA
Total	353.87 *	359.46
1982		
Sewell	195.79	195.77
Owens-Illinois	82.06	82.06
Carolina Packaging	69.89	69.38
Amoco	47.38	47.38
Incon	30.00	30.00
SEC	6.25	6.25
Total	431.37	430.83 *
1983		
Sewell	191.82	191.47
Owens-Illinois	89.92	89.92
Carolina Packaging	66.85	66.85
SEC	61.26	61.26
Amoco	47.16	47.16
Incon/PSP	33.00	33.00
Total	490.01	489.66
1984		
Sewell	206.99	206.99
Owens-Illinois	78.54	78.54
SEC	92.66	92.66
Carolina Packaging	66.62	66.60
Amoco	44.88	44.88
PSP	42.13	42.13
Total	531.82	531.80
1985		
Sewell	202.89	202.90
SEC	148.80	148.80
Owens-Illinois	37.80	37.84
Carolina Packaging	68.30	68.31
PSP	64.28	64.28
Amoco	37.51	37.51
Total	559.59 *	559.64

TABLE 1—Continued

	Plaintiff's Sales Data (millions of bottles)	Defendants' Production Data (millions of bottles)
1986		
SEC	177.42	177.42
Sewell	185.42	183.51
PSP	70.20	70.20
Carolina Packaging	74.19	74.19
Owens-Illinois	29.75	32.44
Amoco	30.14	30.14
Total	567.12	567.90

NA—not applicable.

*—Numbers may not add due to rounding.

Source: Docket No. 235, Tab 1; Docket No. 224, Addendum A.

TABLE 2

Output of 16-ounce/Half liter Plastic Bottles in Sewell's Market
1981-1986

	Plaintiff's Sales Data (millions of bottles)	Defendants' Production Data (millions of bottles)
1981		
Sewell	14.55	14.55
Owens-Illinois	0.00	0.00
Carolina Packaging	0.03	0.03
Amoco	0.00	0.00
Incon	0.00	0.00
SEC	NA	NA
Total	14.58	14.58
1982		
Sewell	30.95	30.95
Owens-Illinois	0.00	0.00
Carolina Packaging	16.97	16.97
Amoco	3.12	3.12
Incon	0.00	0.00
SEC	0.00	0.00
Total	51.05 *	51.05 *
1983		
Sewell	62.25	62.26
Owens-Illinois	0.00	0.00
Carolina Packaging	34.55	34.55
SEC	0.00	0.00
Amoco	0.51	0.51
Incon/PSP	0.00	0.00
Total	97.31	97.31 *
1984		
Sewell	77.40	77.39
Owens-Illinois	0.00	0.00
SEC	0.00	0.00
Carolina Packaging	43.14	43.14
Amoco	0.00	0.00
PSP	1.39	1.39
Total	121.93	121.93 *
1985		
Sewell	67.97	67.97
SEC	136.52	136.52
Owens-Illinois	0.00	0.00
Carolina Packaging	65.48	65.48
PSP	0.14	0.14
Amoco	0.00	0.00
Total	270.10 *	270.10 *

TABLE 2—Continued

	Plaintiff's Sales Data (millions of bottles)	Defendants' Production Data (millions of bottles)
1986		
SEC	295.36	295.35
Sewell	45.43	45.43
PSP	22.54	22.54
Carolina Packaging	98.70	98.43
Owens-Illinois	0.00	0.00
Amoco	0.00	0.00
Total	462.03	461.75

NA—not applicable.

*—Numbers may not add due to rounding.

Source: Docket No. 235, Tab 1; Docket No. 224, Addendum A.

TABLE 3

Output of 3-liter Plastic Bottles in Sewell's Market
1981-1986

	Plaintiff's Sales Data (millions of bottles)	Defendants' Production Data (millions of bottles)
1981		
Sewell	NA	NA
Owens-Illinois	NA	NA
Carolina Packaging	NA	NA
Amoco	NA	NA
Incon	NA	NA
SEC	NA	NA
Total	NA	NA
1982		
Sewell	NA	NA
Owens-Illinois	NA	NA
Carolina Packaging	NA	NA
Amoco	NA	NA
Incon	NA	NA
SEC	NA	NA
Total	NA	NA
1983		
Sewell	NA	NA
Owens-Illinois	NA	NA
Carolina Packaging	NA	NA
SEC	NA	NA
Amoco	NA	NA
Incon/PSP	NA	NA
Total	NA	NA
1984		
Sewell	7.60	7.60
Owens-Illinois	17.42	17.42
SEC	0.00	0.00
Carolina Packaging	0.01	0.01
Amoco	0.01	0.01
PSP	0.00	0.00
Total	25.05 *	25.05 *
1985		
Sewell	27.84	27.84
SEC	14.69	14.69
Owens-Illinois	33.72	37.91
Carolina Packaging	1.42	1.42
PSP	10.70	10.70
Amoco	0.16	0.16
Total	88.53	92.72

TABLE 3—Continued

	Plaintiff's Sales Data (millions of bottles)	Defendants' Production Data (millions of bottles)
1986		
SEC	28.56	28.56
Sewell	33.03	33.71
PSP	22.40	22.40
Carolina Packaging	0.06	0.06
Owens-Illinois	33.43	37.80
Amoco	0.00	0.00
Total	117.49	122.53

NA—not applicable.

*—Numbers may not add due to rounding.

Source: Docket No. 235, Tab 1; Docket No. 224, Addendum A.

TABLE 4

Total Output in Sewell's Market
1981-1986

	2 Liter	16 Oz/ Half Liter	Three Liter	1 Liter	All Bottles com- bined
		(MM Bottles)			(MM Equiv. Cases)
1981	(1)	(2)	(3)	(4)	(5)
Sewell	179.38	14.55	NA	3.99	65.16
Owens-Illinois	69.97	0.00	NA	0.00	24.65
Carolina Packaging	63.80	0.03	NA	0.00	22.48
Amoco	23.31	0.00	NA	0.00	8.21
Incon	23.00	0.00	NA	0.00	8.10
SEC	NA	NA	NA	NA	NA
Total	359.46	14.58	NA	3.99	128.60
1982					
Sewell	195.77	30.95	NA	2.51	72.12
Owens-Illinois	82.06	0.00	NA	0.00	28.90
Carolina Packaging	69.38	16.97	NA	0.00	25.93
Amoco	47.38	3.12	NA	0.00	16.96
Incon	30.00	0.00	NA	0.00	10.57
SEC	6.25	0.00	NA	0.00	2.20
Total	430.83	51.05	NA	2.51	156.69
1983					
Sewell	191.47	62.26	NA	2.07	73.29
Owens-Illinois	89.92	0.00	NA	0.00	31.67
Carolina Packaging	66.85	34.55	NA	0.00	26.59
SEC	61.26	0.00	NA	0.00	21.58
Amoco	47.16	0.51	NA	0.00	16.65
Incon/PSP	33.00	0.00	NA	0.00	11.62
Total	489.66	97.31	NA	2.07	181.41
1984					
Sewell	206.99	77.39	7.60	0.48	83.55
Owens-Illinois	78.54	0.00	17.42	0.00	36.87
SEC	92.66	0.00	0.00	0.00	32.64
Carolina Packaging	66.60	43.14	0.01	0.00	27.11
Amoco	44.88	0.00	0.01	0.00	15.81
PSP	42.13	1.39	0.00	0.00	14.96
Total	531.80	121.93	25.05	0.48	210.94

TABLE 4—Continued

	2 Liter	16 Oz/ Half Liter	Three Liter	1 Liter	All Bottles combined
		(MM Bottles)			(MM Equiv. Cases)
1985					
Sewell	202.90	67.97	27.84	4.79	92.68
SEC	148.80	136.52	14.69	0.00	71.55
Owens-Illinois	37.84	0.00	37.91	0.00	33.36
Carolina Packaging	68.31	65.48	1.42	0.00	30.27
PSP	64.28	0.14	10.70	0.00	28.31
Amoco	37.51	0.00	0.16	0.00	13.30
Total	559.64	270.10	92.72	4.79	269.46
1986					
SEC	177.42	295.35	28.56	0.00	102.20
Sewell	183.51	45.43	33.71	10.96	88.16
PSP	70.20	22.54	22.40	0.00	38.44
Carolina Packaging	74.19	98.43	0.06	0.00	34.37
Owens-Illinois	32.44	0.00	37.80	0.00	31.40
Amoco	30.14	0.00	0.00	0.00	10.62
Total	567.90	461.75	122.53	10.96	305.19

NA—not applicable.

Source: Docket No. 224, Addendum A.

APPENDIX D

IN THE DISTRICT COURT
OF THE UNITED STATES
FOR THE WESTERN DISTRICT
OF NORTH CAROLINA
Charlotte Division

C-C-86-363-M

SEWELL PLASTICS, INC,

Plaintiff,

—vs—

THE COCA-COLA COMPANY (doing business through its division, COCA-COLA USA); SOUTHEASTERN CONTAINER, INC.; ABERDEEN COCA-COLA BOTTLING CO., INC.; ALABAMA COCA-COLA BOTTLING COMPANY; BISCOE COCA-COLA BOTTLING COMPANY, INC.; CAROLINA COCA-COLA BOTTLING CO., INC.; COCA-COLA BOTTLING COMPANY CONSOLIDATED; COCA-COLA BOTTLING COMPANY OF ANDERSON, SOUTH CAROLINA, INC.; COCA-COLA BOTTLING COMPANY OF ASHEVILLE, N.C.; COCA-COLA BOTTLING COMPANY OF MOBILE; COCA-COLA BOTTLING COMPANY OF NASHVILLE, INC.; COCA-COLA BOTTLING COMPANY OF ROANOKE, INC.; COCA-COLA BOTTLING COMPANY OF WILSON, INC.; COCA-COLA BOTTLING COMPANY UNITED, INC.; COCA-COLA BOTTLING WORKS OF TULLAHOMA, INC.; COLUMBIA COCA-COLA BOTTLING COMPANY; COLUMBUS COCA-COLA BOTTLING COMPANY; DORCHESTER COCA-COLA BOTTLING COMPANY; DURHAM COCA-COLA BOTTLING COMPANY, INC.; EASTERN CAROLINA COCA-COLA BOTTLING COMPANY, INC.; FAYETTEVILLE COCA-COLA BOTTLING COMPANY; HAMPTON BOTTLING WORKS, INC.; LINCOLNTON COCA-COLA BOTTLING CO., INC.; MID SOUTH COCA-COLA BOTTLING COMPANY; ORANGEBURG COCA-COLA BOTTLING CO., INC.; PLYMOUTH COCA-COLA BOTTLING CO., INC.; ROCK HILL COCA-COLA BOTTLING CO.; RODDY MANUFACTURING COMPANY; SANFORD COCA-COLA BOTTLING COMPANY;

TARBORO COCA-COLA BOTTLING COMPANY, INC.; THE ATLANTA COCA-COLA BOTTLING COMPANY; THE COASTAL COCA-COLA BOTTLING COMPANY; THE COCA-COLA BOTTLING COMPANY OF HENDERSON, INC.; THE COCA-COLA BOTTLING COMPANY OF JOHNSON CITY, TENNESSEE; and WILMINGTON COCA-COLA BOTTLING WORKS, INC.,

Defendants.

JUDGMENT

[Filed Aug. 25, 1989]

For the reasons set forth in a separate Memorandum of Decision, filed herewith,

IT IS ORDERED, ADJUDGED AND DECREED:

1. That, to the extent that it denied defendants' motion for summary judgment (Docket No. 95), the order of May 6, 1988, as amended (Docket Nos. 146, 152 and 153), is VACATED.

2. That defendants' motion for summary judgment, Docket No. 95, is GRANTED, and plaintiff's action is DISMISSED in its entirety.

3. That for the court expressly determines that there is no just reason for delay and therefore directs that this judgment dismissing plaintiff's action is final under Fed. R. Civ. P. 54(b).

4. That trial of the counterclaims of defendant Southeastern Container, Inc., is hereby STAYED pending final determination of any appeal from this final judgment. Upon final determination of any appeal, or if plaintiff fails to perfect an appeal within the time prescribed by law, this stay will expire automatically.

This 25th day of August, 1989.

/s/ James B. McMillan
JAMES B. MCMILLAN
United States District Judge

APPENDIX E

IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT
OF NORTH CAROLINA
CHARLOTTE DIVISION

C-C-86-363-M

SEWELL PLASTICS, INC.,
Plaintiff,

—vs—

THE COCA-COLA COMPANY (doing business through its division, COCA-COLA USA); SOUTHEASTERN CONTAINER, INC.; ABERDEEN COCA-COLA BOTTLING CO., INC.; ALABAMA COCA-COLA BOTTLING COMPANY; BISCOE COCA-COLA BOTTLING COMPANY, INC.; CAROLINA COCA-COLA BOTTLING CO., INC.; COCA-COLA BOTTLING COMPANY CONSOLIDATED; COCA-COLA BOTTLING COMPANY OF ANDERSON, SOUTH CAROLINA, INC.; COCA-COLA BOTTLING COMPANY OF ASHEVILLE, N.C.; COCA-COLA BOTTLING COMPANY OF MOBILE; COCA-COLA BOTTLING COMPANY OF NASHVILLE, INC.; COCA-COLA BOTTLING COMPANY OF ROANOKE, INC.; COCA-COLA BOTTLING COMPANY OF WILSON, INC.; COCA-COLA BOTTLING COMPANY UNITED, INC.; COCA-COLA BOTTLING WORKS OF TULLAHOMA, INC.; COLUMBIA COCA-COLA BOTTLING COMPANY; COLUMBUS COCA-COLA BOTTLING COMPANY; DORCHESTER COCA-COLA BOTTLING COMPANY; DURHAM COCA-COLA BOTTLING COMPANY, INC.; EASTERN CAROLINA COCA-COLA BOTTLING COMPANY, INC.; FAYETTEVILLE COCA-COLA BOTTLING COMPANY; HAMPTON BOTTLING WORKS, INC.; LINCOLNTON COCA-COLA BOTTLING CO., INC.; MID SOUTH COCA-COLA BOTTLING COM-

PANY; ORANGEBURG COCA-COLA BOTTLING CO., INC.; PLYMOUTH COCA-COLA BOTTLING CO., INC.; ROCK HILL COCA-COLA BOTTLING CO.; RODDY MANUFACTURING COMPANY; SANFORD COCA-COLA BOTTLING COMPANY; TARBORO COCA-COLA BOTTLING COMPANY, INC.; THE ATLANTA COCA-COLA BOTTLING COMPANY; THE COASTAL COCA-COLA BOTTLING COMPANY; THE COCA-COLA BOTTLING COMPANY OF HENDERSON, INC.; THE COCA-COLA BOTTLING COMPANY OF JOHNSON CITY, TENNESSEE; and WILMINGTON COCA-COLA BOTTLING WORKS, INC.,

Defendants.

ORDER

[Filed May 6, 1988]

HISTORY OF PROCEEDINGS

Plaintiff Sewell Plastics, Inc., a national manufacturer of plastic soft drink containers, commenced this suit on August 5, 1986, against defendants the Coca-Cola Company ("Coke"), Southeastern Container, Inc. ("Southeastern"), and thirty-three bottling companies ("the bottlers"). Plaintiff claims that defendants have conspired to form and have formed a combination in restraint of trade in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1; have attempted to monopolize and have monopolized a line of commerce in a distinct geographic market in violation of Section 2 of the Sherman Act, 15 U.S.C. § 2; have engaged in an exclusive dealing arrangement in violation of Section 3 of the Clayton Act, 15 U.S.C. § 14; have acquired stock with the effect of substantially lessening competition in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18; and have violated various provisions of the North Carolina Unfair Trade Practices Act, N.C. Gen. Stat. § 75-1 *et seq.*

On September 29, 1987, defendants moved jointly for summary judgment. Defendant Coke moved on Novem-

ber 6, 1987, for summary judgment on separate grounds. Plaintiff filed on December 1, 1987, a motion for summary judgment dismissing defendant Southeastern's counterclaim and a motion to strike defendant Coke's sixth affirmative defense. On January 19, 1988, plaintiff filed a motion for summary judgment of *per se* illegality.

On April 18, 1988, the court heard oral argument on these motions. The court denied from the bench plaintiff's motion for summary judgment dismissing defendant Southeastern's counterclaim and plaintiff's motion to strike defendant Coke's sixth affirmative defense. The court took the other motions under advisement.

For the reasons stated below, the court rules as follows: 1) defendants' joint motion for summary judgment is ALLOWED IN PART; 2) defendant Coke's motion for summary judgment is DENIED; 3) plaintiff's motion for a declaration of per se illegality is DENIED.

Legal Standard for Summary Judgment

Summary judgment is proper when there is a demonstrated absence of genuine dispute concerning any material fact, and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. Rule 56. When the defendant is the movant, defendant has the initial burden of showing the court that the record demonstrates an absence of genuine issue of material fact. *Celotex Corporation v. Catrett*, 477 U.S. 317, 323 (1986). Defendant also has the burden of persuading the trial court that, on the undisputed facts, plaintiff's claims are not legally viable.

Alternatively, the defendant may discharge its burden by showing the trial court that the evidence supporting a necessary element of plaintiff's legal claim is insufficient as a matter of law to justify a rational fact-finder in finding that plaintiff was able to prove that element.

Celotex, 477 U.S. 323-3; *Matsushita Electric Industrial Co. v. Zenith Radio*, 475 U.S. 574, 586-7 (1986). The burden then shifts to plaintiff to identify evidence raising at least a triable issue of fact as to the element in question. *Celotex*, 477 U.S. at 324.

All inferences from the evidence are to be drawn in favor of the non-movant. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970).

Factual Conclusions for the Purpose of the Pending Motions

The evidence of record, viewed in the light most favorable to plaintiff, supports the following factual conclusions:

This suit arises out of the formation of Southeastern Container, Inc. in 1982. Southeastern was formed by some of the bottlers to supply themselves and other Coca-Cola bottlers with plastic soft drink bottles. The bottlers own and control Southeastern.

Plaintiff was the largest supplier of plastic soft drink bottles to the bottlers prior to 1982.

The parties have labeled the relevant geographic market for analysis of plaintiff's claims the "Southeast area." This region is comprised of North Carolina, South Carolina, Georgia, Alabama, Tennessee and Virginia.

The bottler defendants are most of the bottlers licensed by Coke to bottle and sell Coca-Cola soft drink products in the southeast area. The bottlers' license agreement with Coke provides that each bottler shall have the exclusive right to bottle and sell Coke products within a specific territory. Thus, on paper, the bottlers do not directly compete for sales to customers located within their exclusive territories. This territorial sales market division is not the subject of any of plaintiff's legal claims.

Prior to the formation of Southeastern in 1982, the bottlers were competitors or potential competitors with one another on the buying side of their business, in obtaining a supply of plastic bottles at the lowest cost, of the highest quality, and on the best terms from one or more suppliers such as plaintiff. In 1981, plaintiff supplied over 90% of the bottlers' aggregate requirements for plastic bottles.

Some of the bottler defendants had engaged in a joint venture known as South Atlantic Canners, Inc. ("SAC") prior to 1981. SAC was a corporation which filled with soft drink products cans the bottlers purchased from merchant can suppliers. Based on information supplied by Coke, the bottlers who formed SAC and other bottlers considered the possibility of investing in a company to manufacture plastic bottles to supply their requirements, and formed Southeastern.

Southeastern is wholly owned by the bottlers to whom it supplies plastic bottles. Employees of the bottlers and of Southeastern serve as Southeastern's board of directors.

In 1981, representatives of certain of the bottler defendants met with representatives of plaintiff. The bottlers' representatives told plaintiff's representatives that the bottlers would join together to manufacture their own bottles if plaintiff was unable to supply 2-liter bottles for $200 per thousand. This price was lower than any other price then being offered in the Southeast area.

Before Southeastern was capable of making and delivering bottles, the bottlers entered into supply contracts with Southeastern. Under these contracts, the bottlers agreed to purchase 80% of their annual requirements for a five year period. The bottlers were obligated to accept Southeastern's set price for the first year of the contract. After the first year, the contracts provided that the bottlers could purchase in excess of 20% of their require-

ments from another source only if they proved that two other suppliers offered lower prices over a six month period, and that Southeastern was unable to meet within sixty days an average of the two lowest prices.

Long-term supply contracts for such a significant portion of a bottler's requirements were common in the plastic bottle supply market prior to the formation of Southeastern. However, the Southeastern price clause was more restrictive than plaintiff's. Plaintiff's contracts, by contrast, required plaintiff to meet a lower price or to allow the bottler to purchase elsewhere.

The bottlers also agreed that Southeastern would charge all the owner-bottlers the same price, and that transportation costs to bottlers located at different distances from Southeastern's plant would be "equalized" so that no owner-bottler would enjoy a lower transportation cost by reason of its geographic proximity to Southeastern.

DEFENDANTS' JOINT MOTION FOR SUMMARY JUDGMENT

Plaintiff's Claim Under Section 1 of the Sherman Act

Section 1 of the Sherman Act prohibits concerted activity which results in an unreasonable restraint of trade. *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284, 289 (1985). A restraint is unreasonable when its purpose and effect are to injure competition. *United States v. Socony-Vacuum Oil Company*, 310 U.S. 150, 223-4 (1940); *see also, Board of Trade of the City of Chicago v. United States*, 246 U.S. 231, 238 (1918).

Courts have developed a two-tier system of analyzing restraints under Section 1. Certain categories of business behavior have been labeled *per se* unlawful because "their pernicious effect on competition and lack of any redeeming virture are conclusively presumed to be unreasonable

and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use." *Northwest Stationers*, 472 U.S. at 289, quoting *Northern Pacific R. Co. v. U.S.*, 356 U.S. 1, 5 (1958). Such *per se* rules permit courts to "avoid the significant costs in business certainty and litigation efficiency that a full-fledged . . . inquiry entails." *Northwest Stationers*, 472 U.S. at 289.

The Supreme Court has applied the *per se* prohibition to four kinds of conduct: 1) price-fixing, 2) certain concerted refusals to deal, 3) horizontal market division, and 4) tying arrangements. *Construction Aggregate Transport, Inc. v. Florida Rock Industries, Inc.*, 710 F.2d 752, 772 (11th Cir. 1983); *Cascade Cabinet Co. v. Western Cabinet & Millwork, Inc.*, 710 F.2d 1366, 1370 (9th Cir. 1983).

Under a *per se* analysis, the plaintiff need not show specific anti-competitive effects in a relevant product and geographic market because such anti-competitive effects are presumed to flow from a *per se* unlawful restaint. *Construction Aggregate*, 710 F.2d at 771. "The decision whether to apply the *per se* rule turns on 'whether the practice *facially appears* to be one that would *always or almost always* tend to restrict competition and decrease output . . . [and not] . . . one designed to increase economic efficiency and render markets more, rather than less, competitive.'" *Northwest Stationers*, 472 U.S. at 289-90, quoting *Broadcast Music, Inc. v. Columbia Broadcasting System*, 441 U.S. 1, 19-20 (1979) (Emphasis added).

Plaintiff alleges that defendants' conduct constitutes both an unlawful concerted refusal to deal, or "group boycott," and unlawful price fixing. Defendants challenge the applicability of these theories on motion for summary judgment. The applicability of each of these theories to defendants' conduct is examined separately below.

The Group Boycott Claim

In *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, the Supreme Court recently held that exclusion by a wholesale purchasing cooperative of one of its member-retailers for violation of a cooperative rule was not an unlawful concerted refusal to deal either under a *per se* or a rule of reason analysis. In his opinion for a unanimous court, Justice Brennan summarized the law on "group boycotts" or *per se* unlawful concerted refusals to deal:

> Cases to which this Court has applied the *per se* approach have generally involved joint efforts by a firm or firms to disadvantage competitors by 'either directly denying or persuading or coercing suppliers or customers to deny relationships the competitors need in the competitive struggle.' Sullivan, *supra*, at 261-262. See, *e.g.*, *Silver*, *supra* (denial of necessary access to exchange members); *Radiant Burners, Inc. v. Peoples Gas Light & Coke Co.*, 364 U.S. 656 (1961) (denial of necessary certification of product); *Associated Press v. United States*, 326 U.S. 1 (1945) (denial of important sources of news); *Klor's Inc.*, *supra* (denial of wholesales supplies). In these cases, the boycott often cut off access to a supply, facility, or market necessary to enable the boycotted firm to compete, *Silver*, *supra*; *Radiant Burners, Inc.*, *supra*, and frequently the boycotting firms possessed a dominant position in the relevant market. *E.g.*, *Silver*, *supra*; *Associated Press*, *supra*; *Fashion Originators' Guild of America, Inc. v. FTC* 312 U.S. 457 (1941). See generally Brodley, Joint Ventures and Antitrust Policy, 95 Harv. L. Rev. 1523, 1533, 1563-1565 (1982). In addition, the practices were generally not justified by plausible arguments that they were intended to enhance overall efficiency and make markets more competitive. Under such circumstances the

> likelihood of anticompetitive effects is clear and the possibility of countervailing procompetitive effects is remote.

Northwest Stationers, 472 U.S. at 294.

The conduct challenged here as a "group boycott" is the bottlers' agreement, as a group, to enter into individual supply contracts with Southeastern, under which the bottlers agreed to purchase 80% of their annual requirements of plastic soft drink bottles for five years. The evidence is undisputed that the bottlers did enter these contracts. A rational trier of fact would be fully justified in concluding that the bottlers as a group agreed to do so prior to contract formation, and that Southeastern made efforts to exact compliance with the contracts after they were executed.

It is also undisputed that the bottlers purchased 17% of their aggregate requirements from Sewell during the contract period, and uncontradicted that some bottlers purchased in excess of 20%.

These facts, viewed in the light most favorable to plaintiff, are insufficient as a matter of law to justify application of the *per se* rule under the Supreme Court's decision in *Northwest Stationers*.

The cases cited by the court in *Northwest Stationers* involve *denial of access*, by those refusing to deal, to "a supply, facility or market" necessary to enable the boycotted firm to compete. *Id.* Here, there has been no showing by plaintiff of any such denial. First, plaintiff has had continuing, though limited, access to the customers allegedly participating in the boycott. Second, there is ininsufficient evidence in the record from which a rational trier of fact could find that the bottlers' business was *necessary* to enable plaintiff to compete in the southeast area market. There are other plastic bottle customers in that market (*i.e.*, Pepsi bottlers). Plaintiff has pointed to

no evidence in the record describing the respective market shares of the soft drink bottlers. Such evidence might allow a fact finder to determine whether the bottlers' 80% requirements contracts denied plaintiff access to "a market."

A rational trier of fact could not find from the evidence of record that defendants have denied plaintiff relationships "necessary to enable plaintiff to compete," in the sense intended by the unanimous *Northwest Stationers* court. The foreclosure from 80% of the bottler defendants' business has not been shown to approach the total denial of plaintiff's private telephone wire access to New York stock exchange members held *per se* illegal in *Silver v. New York Stock Exchange*, 373 U.S. 341 (1963); the effectively total market foreclosure of plaintiff's product by the American Gas Association's denial of certification held *per se* unlawful in *Radiant Burners, Inc. v. Peoples Gas & Co.*, 364 U.S. 656 (1961); the effective denial of access by a retail department store to a wholesale supply of ten major national manufacturers' products held *per se* unlawful in *Klors, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959); or the denial of access to information produced by a major national news service held *per se* unlawful in *Associated Press v. United States*, 326 U.S. 1 (1945).

To regard the exclusion at issue here as *per se* unlawful would also be an expansion of the *per se rule* because the boycott cases involve combinations between independent businesses that compete *for all other purposes.* Even assuming that plaintiff can prove all the forms of competition between the bottlers it has alleged, this case is distinguishable because there is a substantial component of the bottlers' selling business in which the bottlers do not compete.

Plaintiff has pointed to evidence which could support a rational finding of fact that the bottlers do or did compete

in the following ways: First, on the buying side, the bottlers competed for a supply of plastic bottles prior to Southeastern's formation. Second, on the selling side, the bottlers "compete" and by selling products to chain stores which distribute the product to stores located outside the bottlers' exclusive territory. Some bottlers compete for the filling business of non-filling bottlers.

The evidence is undisputed that the bottlers do not compete in sales to buying customers located within their exclusive territories, except for the chain stores. Plaintiff has not pointed to any other evidence which shows that the bottlers compete on the buying side obtaining other inputs, such as soft-drink syrup.

The lack of competition between bottlers due to their exclusive geographic sales territories, along with the *presence* of competition between bottlers of *different* brands within the same territories, substantially reduces the antitrust risks of the bottlers' joint venture combination. *See*, Brodley, *Joint Ventures and Antitrust Policy*, 95 Harvard Law Review, 1523, 1561 (1982). A major focus of judicial construction of Section 1 has been to prevent combinations between competing firms which enable the combination to control prices, restrict output, limit market entry by would-be competitor firms, or otherwise reduce consumer choice. *See*, *Arizona v. Maricopa County Medical Society*, 457 U.S. 332, 348-56 (1982). *See*, *also*, *Rothery Storage & Van Co. v. Atlas Van Lines*, 792 F.2d 210 (D.C. Cir. 1986), *cert. denied*, 107 S.Ct. 880 (1987). The bottlers' ability *as a group* to do any of these things is limited by competition between Coke products and other soft-drink manufacturers' products.

No case cited by plaintiffs in support of their group boycott theory involves a combination between businesses that have substantial selling operations in exclusive territories. For example, *Klors' Inc. v. Broadway-Hale Stores* involved a combination between unrelated compet-

ing manufacturers, their wholesale distributors, and a company operating a department store located next to plaintiff's department store. *Construction Aggregate Transport v. Florida Rock Industries* involved a combination between one of plaintiffs' largest customers and a supplier of that customer which owned a transportation subsidiary directly in competition with plaintiff. *Com-Tel, Inc. v. Dukane Corp.*, 669 F.2d 404 (6th Cir. 1982), involved a combination between a distributor competing with plaintiff in the same geographic area, and a supplying manufacturer who refused to deal with plaintiff. *Weiss v. York Hospital*, 745 F.2d 786, (3rd Cir. 1985), involved the use by M.D.'s of their control over hospital admissions to exclude osteopaths, whom the court found to be *direct competitors* for patients. *Weiss*, 745 F.2d at 819. *United States v. Columbia Pictures*, 507 F.Supp. 412 (S.D. N.Y. 1980) was a combination between motion picture companies that were competitors in production *and* distribution of films.

The lack of total competition between the bottlers in selling their products is also sufficient to remove the group boycott claim from *per se* treatment because that lack of competition makes the adverse effect of the bottlers' combination *non-obvious*. In a series of opinions beginning with *Broadcast Music, Inc. v. CBS*, 441 U.S. 1 (1979), the Supreme Court has "reformed the law of horizontal restraints." *Rothery Storage & Van Co.*, 792 F.2d at 226. Three principles stand out from this line of decisions.

The first principle is that courts should take care not to expand indiscriminately the category of restraints classed as group boycotts. *Federal Trade Commission v. Indiana Federation* that the court should go beyond a literal approach to *per se* analysis, the approach urged by plaintiff here, and analyze whether a challenged practice is "plainly anticompetitive and very likely without redeeming value." *Broadcast Music*, 441 U.S. at 9; *See also*,

Northwest Stationers, 472 U.S. 289-90. The third principle is that "it is only after considerable experience with certain business relationships that courts classify them as *per se violations.*" *Broadcast Music*, 441 U.S. at 9, quoting *United States v. Topco Associates*, 405 U.S. 596, 607-8 (1972); *See also, Indiana Federation of Dentists*, 476 U.S. at 458-9.

These principles support the entry of summary judgment as to plainitff's claim that defendants have engaged in a *per se* illegal group boycott. To subject defendants' conduct to *per se* analysis would expand the category of group boycott beyond its former boundaries because no rational trier of fact could find that plaintiff has been denied access to a market necessary to enable plaintiff to compete, and because, unlike the classic group boycott cases, defendants do not compete in a substantial portion of their selling activities.

Nor is the defendants' agreement to enter the supply contracts "plainly anticompetitive and without redeeming value." Defendants have realized undisputed business advantages from the formation of Southeastern, which facilitates their ability to compete with other soft drink manufacturers.

Finally, defendants' conduct presents a situation with which the courts appear to be relatively unfamiliar. Neither party has cited a Section 1 case involving a similar combination between independent businesses that do substantial sales in exclusive territories.

This court holds, therefore, that the evidence is insufficient as a matter of law to support a finding that defendants' conduct was a *per se* unlawful group boycott. The court also holds that defendants' conduct was not *per se* unlawful as a group boycott.

* * * *

Although not per se unlawful, a concerted refusal to deal may still be a violation of the Sherman Act under

the "Rule of Reason" if its anti-competitive effects outweigh its pro-competitive justifications. *National College Athletic Association v. Board of Regents of University of Oklahoma*, 468 U.S. 85, 113 (1984).

Defendants asserted in oral argument on these motions that summary judgment dismissing all of plaintiff's claims is required because plaintiff's evidence is insufficient to raise a reasonable inference that defendants' combination had the effect of 1) raising prices or 2) reducing output.

This argument distorts the legal authority on which defendants themselves rely. The relevant cited passages, and other controlling authorities, do not contrue anti-competitive effects so narrowly.

Plaintiff's evidence is sufficient to raise a genuine question of fact about the effect on competition of the bottlers' agreement to enter the supply contracts.

The Price-Fixing Claim

A rational fact-finder could conclude the following from the evidence of record:

1. Southeastern charged the bottler-defendants uniform prices for bottles.

2. Southeastern charged bottlers the same price for transportation regardless of the differing distances from Southeastern's plant to the individual bottlers.

3. Southeastern's supply contracts all contained a standard provision requiring the buyer to take its supply at whatever price Southeastern set for the first twelve months of the contract.

4. Southeastern's supply contracts all contained a standard provision requiring Southeastern to lower its price *after* the first twelve months, only if the buyer could prove that other suppliers had offered a lower price over a six month period. Southeastern could fulfill its obligation by meeting an average of the two lowest prices.

5. These price restraints were imposed as a result of agreement between the bottler defendants.

If the above facts were found, they might be sufficient to establish *per se* unlawful price fixing *if* the defendant bottlers were engaged in a purely competitive relationship outside the confines of their combination. However, because this conduct, if shown, took place within the structure of less-than-complete competition outlined above, it would oversimplify the situation to apply a *per se* label to it. *See, Broadcast Music*, 441 U.S. at 9-10; *See also, Rothery Storage & Van Co.*, 792 F.2d at 226.

Several features of the defendants' enterprise make the anti-competitive effect of these restraints less than obvious. First, the defendants are setting a *price* for inputs to their production *charged by a joint venture which they own.* In this situation, defendants have *no* obvious incentive to raise prices or restrict output, because they would be raising the cost of their own products. That price is subject to competitive pressure from the prices charged by the distributors of other brands of soft drinks.

This feature of defendants' conduct distinguishes the *per se* price-fixing cases on which plaintiff relies. In no case cited by plaintiff did a court hold a price-fixing agreement *per se* illegal where the price-fixing companies were setting a price charged to them by a source of supply owned *by them.*

Second, the price restraints could well be found to be plausibly related to the success of the joint venture. The price restraints could plausibly guarantee that each bottler stockholder will receive a comparably-priced supply, and that bottlers located near the plant will not have a comparative advantage due to their proximity. This device had plausible utility for attracting investors in the enterprise, increasing the volume, and lowering Southeastern's marginal cost of production. This in turn could enable Southeastern to lower its prices, enabling

the bottlers to compete more effectively with bottlers of other soft drink brands.

The "price competition" clause plausibly enabled Southeastern to avoid losing demand for its production due to heavy discounting by an established supplier. There is no evidence that the price competition clause enabled Southeastern to maintain prices at a higher than market level. Indeed, one of plaintiff's arguments is that Southeastern's assured volume allowed it to offer prices at an "artificially low" level.

These restraints were not on their face "plainly anti-competitive and without redeeming value." *Broadcast Music*, 441 U.S. at 9. Because the courts have not addressed similar restraints in a similar joint venture context, these are not business relationships with which the courts have considerable experience. The application of *per se* analysis is therefore unjustified.

Plaintiff's evidence is sufficient to raise issues of material fact as to the anti-competitive effects of these restraints. The application of Rule of Reason analysis at trial is appropriate.

IT IS THEREFORE ORDERED:

1. That defendants' motion for summary judgment, as to plaintiff's claim that the agreement to enter the supply contracts is *per se* unlawful, is ALLOWED;

2. That defendants' motion for summary judgment, as to plaintiff's claim that the agreement to enter the supply contracts is unlawful under the Rule of Reason, is DENIED;

3. That defendants' motion for summary judgment, as to plaintiff's claim that the price restraints are *per se* unlawful, is ALLOWED;

4. That defendants' motion for summary judgment, as to plaintiff's claim that the price restraints are unlawful under the Rule of Reason, is DENIED;

5. That defendants' joint motion for summary judgment, as to all of plaintiff's other claims, is DENIED;

6. That plaintiff's motion for summary judgment of *per se* illegality, docket #109, is DENIED;

7. That the separate motion of defendant The Coca-Cola Company for summary judgment, docket #104, is DENIED.

This 6 day of May, 1988.

/s/ James B. McMillan
JAMES B. MCMILLAN
United States District Judge

APPENDIX F

IN THE DISTRICT COURT
OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF
NORTH CAROLINA
Charlotte Division

C-C-86-363-M

SEWELL PLASTICS, INC.,
Plaintiff,

-vs-

THE COCA-COLA COMPANY (doing business through its division, COCA-COLA USA); SOUTHEASTERN CONTAINER, INC.; ABERDEEN COCA-COLA BOTTLING CO., INC.; ALABAMA COCA-COLA BOTTLING COMPANY; BISCOE COCA-COLA BOTTLING COMPANY, INC.; CAROLINA COCA-COLA BOTTLING CO., INC.; COCA-COLA BOTTLING COMPANY CONSOLIDATED; COCA-COLA BOTTLING COMPANY OF ANDERSON, SOUTH CAROLINA, INC.; COCA-COLA BOTTLING COMPANY OF ASHEVILLE, N.C.; COCA-COLA BOTTLING COMPANY OF MOBILE; COCA-COLA BOTTLING COMPANY OF NASHVILLE, INC.; COCA-COLA BOTTLING COMPANY OF ROANOKE, INC.; COCA-COLA BOTTLING COMPANY OF WILSON, INC.; COCA-COLA BOTTLING COMPANY UNITED, INC.; COCA-COLA BOTTLING WORKS OF TULLAHOMA, INC.; COLUMBIA COCA-COLA BOTTLING COMPANY; COLUMBUS COCA-COLA BOTTLING COMPANY; DORCHESTER COCA-COLA BOTTLING COMPANY; DURHAM COCA-COLA BOTTLING COMPANY, INC.; EASTERN CAROLINA COCA-COLA BOTTLING COMPANY, INC.; FAYETTEVILLE COCA-COLA BOTTLING COMPANY; HAMPTON BOTTLING WORKS, INC.; LINCOLNTON COCA-COLA BOTTLING CO., INC.; MID SOUTH COCA-COLA BOTTLING COM-

PANY; ORANGEBURG COCA-COLA BOTTLING CO., INC.; PLYMOUTH COCA-COLA BOTTLING CO., INC.; ROCK HILL COCA-COLA BOTTLING CO.; RODDY MANUFACTURING COMPANY; SANFORD COCA-COLA BOTTLING COMPANY; TARBORO COCA-COLA BOTTLING COMPANY, INC.; THE ATLANTA COCA-COLA BOTTLING COMPANY; THE COASTAL COCA-COLA BOTTLING COMPANY; THE COCA-COLA BOTTLING COMPANY OF HENDERSON, INC.; THE COCA-COLA BOTTLING COMPANY OF JOHNSON CITY, TENNESSEE; and WILMINGTON COCA-COLA BOTTLING WORKS, INC.,

Defendants.

ORDER

[Filed July 27, 1988]

This Court's order entered May 6, 1988, Docket #146, is hereby amended by adding the following text at Page 7, line 7:

> Coke's involvement in the formation and success of Southeastern was substantial. Coke's manager of vertical integration presented financial projections and plans for a plastic bottle self-manufacturing venture to a meeting of bottlers, immediately after which the bottlers voted to pursue a self-manufacturing strategy. Coke agreed to guarantee debts generated by the formation of Southeastern, although such a guarantee was never executed. When bottlers hesitated to enter supply contracts with Southeastern they were called before a Southeastern Board meeting held at Coke headquarters. Coke's manager of vertical integration targeted specific bottlers who were unwilling to embrace the self-manufacture concept for persuasion and approached them for that purpose. Two of the bottlers approached by Coke subsequently entered contracts with Southeastern. When Southeastern was unable to

produce bottles that met Coke's specifications for packaging of Coke's licensed products, Coke temporarily relaxed the specifications, enabling bottlers to honor their supply contracts with Southeastern.

IT IS SO ORDERED, this 27 day of July, 1988.

/s/ James B. McMillan
JAMES B. MCMILLAN

APPENDIX G

IN THE DISTRICT COURT
OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF
NORTH CAROLINA
Charlotte Division

C-C-86-363-M

SEWELL PLASTICS, INC.,
Plaintiff,

-vs-

THE COCA-COLA COMPANY (doing business through its division, COCA-COLA USA); SOUTHEASTERN CONTAINER, INC.; ABERDEEN COCA-COLA BOTTLING CO., INC.; ALABAMA COCA-COLA BOTTLING COMPANY; BISCOE COCA-COLA BOTTLING COMPANY, INC.; CAROLINA COCA-COLA BOTTLING CO., INC.; COCA-COLA BOTTLING COMPANY CONSOLIDATED; COCA-COLA BOTTLING COMPANY OF ANDERSON, SOUTH CAROLINA, INC.; COCA-COLA BOTTLING COMPANY OF ASHEVILLE, N.C.; COCA-COLA BOTTLING COMPANY OF MOBILE; COCA-COLA BOTTLING COMPANY OF NASHVILLE, INC.; COCA-COLA BOTTLING COMPANY OF ROANOKE, INC.; COCA-COLA BOTTLING COMPANY OF WILSON, INC.; COCA-COLA BOTTLING COMPANY UNITED, INC.; COCA-COLA BOTTLING WORKS OF TULLAHOMA, INC.; COLUMBIA COCA-COLA BOTTLING COMPANY; COLUMBUS COCA-COLA BOTTLING COMPANY; DORCHESTER COCA-COLA BOTTLING COMPANY; DURHAM COCA-COLA BOTTLING COMPANY, INC.; EASTERN CAROLINA COCA-COLA BOTTLING COMPANY, INC.; FAYETTEVILLE COCA-COLA BOTTLING COMPANY; HAMPTON BOTTLING WORKS, INC.; LINCOLNTON COCA-COLA BOTTLING CO., INC.; MID SOUTH COCA-COLA BOTTLING COM-

PANY; ORANGEBURG COCA-COLA BOTTLING CO., INC.; PLYMOUTH COCA-COLA BOTTLING CO., INC.; ROCK HILL COCA-COLA BOTTLING CO.; RODDY MANUFACTURING COMPANY; SANFORD COCA-COLA BOTTLING COMPANY; TARBORO COCA-COLA BOTTLING COMPANY, INC.; THE ATLANTA COCA-COLA BOTTLING COMPANY; THE COASTAL COCA-COLA BOTTLING COMPANY; THE COCA-COLA BOTTLING COMPANY OF HENDERSON, INC.; THE COCA-COLA BOTTLING COMPANY OF JOHNSON CITY, TENNESSEE; and WILMINGTON COCA-COLA BOTTLING WORKS, INC.,

Defendants.

ORDER

[Filed March 3, 1989]

On March 1, 1989, the court heard all pretrial motions.

IT IS ORDERED that:

1. Defendants' motions to exclude evidence of soft drink price-fixing by certain bottlers, Docket ##179 and 182, is GRANTED. However, if other evidence at trial makes evidence of price-fixing relevant, the court will reconsider this order.

2. Plaintiff's motion to vacate the court's dismissal of *per se* claims in its May 6, 1988, order, Docket #184, is DENIED.

3. Plaintiff's motion to clarify the May 6, 1988, order as it relates to Sewell's *per se* resin price-fixing claim, Docket #184, is ALLOWED. The May 6, 1988, order denied plaintiff's motion that the court find that joint resin purchasing by Southeastern and two other plastic bottle manufacturers is a *per se* violation of the Sherman Act. However, plaintiff's claim that the joint resin purchasing is illegal under the "Rule of Reason" is an issue for trial.

4. Plaintiff's motion to preclude evidence of statements made during the course of "settlement discussions," Docket #184, is taken under advisement. Rulings will be made on admitting that evidence if and when it is offered at trial, and in the context of the other evidence at trial.

5. Plaintiff's motion to rule inadmissible defendants' expert economist's opinion regarding Sewell's motivation and purpose in bringing this action, Docket #184, is GRANTED. Counsel shall not attempt to ask Professor Baumol to divine plaintiff's intent in bringing this action. However, to assist the jury in determining whether this suit is being brought for an anticompetitive purpose, Professor Baumol may testify about the impact on the relevant market, should plaintiff obtain the relief sought in this suit.

6. Defendant The Coca-Cola Company's motion to exclude evidence, Docket #182, is DENIED, without prejudice to renewal at trial, except that evidence of soft drink price-fixing by two of the defendant bottlers shall be dealt with as provided in paragraph one of this order.

This 3 day of March, 1989.

/s/ James B. McMillan
JAMES B. MCMILLAN
United States District Judge

APPENDIX H

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 88-8110

SEWELL PLASTICS, INC.,
Respondent,

v.

THE COCA-COLA COMPANY (doing business through its division, COCA-COLA USA); SOUTHEASTERN CONTAINER, INC.; ABERDEEN COCA-COLA BOTTLING CO., INC.; ALABAMA COCA-COLA BOTTLING COMPANY; BISCOE COCA-COLA BOTTLING COMPANY, INC.; CAROLINA COCA-COLA BOTTLING CO., INC.; COCA-COLA BOTTLING COMPANY CONSOLIDATED; COCA-COLA BOTTLING COMPANY OF ANDERSON, SOUTH CAROLINA, INC.; COCA-COLA BOTTLING COMPANY OF ASHEVILLE, N.C.; COCA-COLA BOTTLING COMPANY OF MOBILE; COCA-COLA BOTTLING COMPANY OF NASHVILLE, INC.; COCA-COLA BOTTLING COMPANY OF ROANOKE, INC.; COCA-COLA BOTTLING COMPANY OF WILSON, INC.; COCA-COLA BOTTLING COMPANY UNITED, INC.; COCA-COLA BOTTLING WORKS OF TULLAHOMA, INC.; COLUMBIA COCA-COLA BOTTLING COMPANY; COLUMBUS COCA-COLA BOTTLING COMPANY; DORCHESTER COCA-COLA BOTTLING COMPANY; DURHAM COCA-COLA BOTTLING COMPANY, INC.; EASTERN CAROLINA COCA-COLA BOTTLING COMPANY, INC.; FAYETTEVILLE COCA-COLA BOTTLING COMPANY; HAMPTON BOTTLING WORKS, INC.; LINCOLNTON COCA-COLA BOTTLING CO., INC.; MID SOUTH COCA-COLA BOTTLING COMPANY; ORANGEBURG COCA-COLA BOTTLING CO., INC.; PLYMOUTH COCA-COLA BOTTLING CO., INC.; ROCK HILL

COCA-COLA BOTTLING CO.; RODDY MANUFACTURING COMPANY; SANFORD COCA-COLA BOTTLING COMPANY; TARBORO COCA-COLA BOTTLING COMPANY, INC.; THE ATLANTA COCA-COLA BOTTLING COMPANY; THE COASTAL COCA-COLA BOTTLING COMPANY; THE COCA-COLA BOTTLING COMPANY OF HENDERSON, INC.; THE COCA-COLA BOTTLING COMPANY OF JOHNSON CITY, TENNESSEE; and WILMINGTON COCA-COLA BOTTLING WORKS, INC.,
Petitioners.

ORDER

[Filed September 6, 1988]

Upon consideration of petitioners' motion for leave to respond to the motion for dismissal,

IT IS ORDERED that the motion for leave to respond is granted.

Upon consideration of the petition for permission to appeal and the response thereto,

IT IS FURTHER ORDERED, on the merits, that the petition for leave to take an interlocutory appeal is denied.

Entered at the direction of Chief Judge Winter, with the concurrence of Judge Hall and Judge Phillips.

For the Court

/s/ John M. Greacen
Clerk

APPENDIX I

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF
NORTH CAROLINA
Charlotte Division

C-C-86-363-M

SEWELL PLASTICS, INC.,
Plaintiff,

—vs—

THE COCA-COLA COMPANY (doing business through its division, COCA-COLA USA); SOUTHEASTERN CONTAINER, INC.; ABERDEEN COCA-COLA BOTTLING CO., INC.; ALABAMA COCA-COLA BOTTLING COMPANY; BISCOE COCA-COLA BOTTLING COMPANY, INC.; CAROLINA COCA-COLA BOTTLING CO., INC.; COCA-COLA BOTTLING COMPANY CONSOLIDATED; COCA-COLA BOTTLING COMPANY OF ANDERSON, SOUTH CAROLINA, INC.; COCA-COLA BOTTLING COMPANY OF ASHEVILLE, N.C.; COCA-COLA BOTTLING COMPANY OF MOBILE; COCA-COLA BOTTLING COMPANY OF NASHVILLE, INC.; COCA-COLA BOTTLING COMPANY OF ROANOKE, INC.; COCA-COLA BOTTLING COMPANY OF WILSON, INC.; COCA-COLA BOTTLING COMPANY UNITED, INC.; COCA-COLA BOTTLING WORKS OF TULLAHOMA, INC.; COLUMBIA COCA-COLA BOTTLING COMPANY; COLUMBUS COCA-COLA BOTTLING COMPANY; DORCHESTER COCA-COLA BOTTLING COMPANY; DURHAM COCA-COLA BOTTLING COMPANY, INC.; EASTERN CAROLINA COCA-COLA BOTTLING COMPANY, INC.; FAYETTEVILLE COCA-COLA BOTTLING COMPANY; HAMPTON BOTTLING WORKS, INC.; LINCOLNTON COCA-COLA BOTTLING CO., INC.; MID SOUTH COCA-COLA BOTTLING COMPANY; ORANGEBURG COCA-COLA BOTTLING CO., INC.;

PLYMOUTH COCA-COLA BOTTLING CO., INC.; ROCK HILL COCA-COLA BOTTLING CO.; RODDY MANUFACTURING COMPANY; SANFORD COCA-COLA BOTTLING COMPANY; TARBORO COCA-COLA BOTTLING COMPANY, INC.; THE ATLANTA COCA-COLA BOTTLING COMPANY; THE COASTAL COCA-COLA BOTTLING COMPANY; THE COCA-COLA BOTTLING COMPANY OF HENDERSON, INC.; THE COCA-COLA BOTTLING COMPANY OF JOHNSON CITY, TENNESSEE; and WILMINGTON COCA-COLA BOTTLING WORKS, INC.,

Defendants.

ORDER

[Filed July 27, 1988]

Pursuant to 28 U.S.C. § 1292(b), the court hereby finds that its order entered May 6, 1988, involves controlling questions of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate appeal from the order may materially advance the ultimate termination of this litigation. The controlling questions are:

1. Is plaintiff's evidence of an adverse effect on competition legally sufficient to raise a genuine issue of fact as to whether defendants have violated Sections 1 or 2 of the Sherman Act, or Sections 3 or 7 of the Clayton Act, or N.C.G.S. §§ 75-1, 75-1.1, 75-5(b) (1, 2, 3, 7)?

2. To establish a violation of the antitrust laws, in a case in which the "Rule of Reason" applies, must a plaintiff show some actual or probable adverse effect on price or output?

The court hereby certifies the foregoing questions for immediate appeal under 28 U.S.C. § 1292(b) and, if the United States Court of Appeals for the Fourth Circuit

grants defendant's permission to pursue a discretionary appeal, stays further proceedings in this case pending determination of that appeal.

This 27 day of July, 1988.

/s/ James B. McMillan
JAMES B. MCMILLAN

APPENDIX J

EXCERPT FROM TRANSCRIPT OF TRIAL PROCEEDING ON MARCH 28, 1989, BEFORE THE HONORABLE JAMES B. McMILLAN

* * * *

[229] COURT: I don't want to be the cause of an untold delay in the trial, but I will let you know what I conclude about this at 2:00 o'clock. We're being recessed until 2:00 o'clock.

(LUNCH RECESS FROM 12:30 P.M. to 2:00 P.M.)

COURT: Is there anything further that the Court ought to hear on the Motion?

MR. JACOBSON: The Defendants have made our position clear, Your Honor.

MR. ARON: Nothing further, Your Honor.

COURT: The Court has spent the last hour and half trying to figure whether there was a rational way not to do what I felt I should do, and I haven't been able to figure out such a rational way.

There does not appeal to be genuine dispute about any material fact that may be necessary to support a judgment. The proposed evidence, as I hear it, does not propose to demonstrate a violation of antitrust laws. The combine in question is a group of purchasers who formed —organized a manufacturing facility, essentially, for their own needs, and set it up for that purpose. The aim was limited to provide lower cost bottles for the members. The results were obviously in the public interest. The [230] price of bottles dropped substantially from—I don't remember what the figures were, but something like 40 percent or more over the time.

The evidence of predatory pricing, if there was any, did not register on my memory, and neither in the facts as called to my attention nor in the statements of counsel does the Court seem to find a motive or a purpose or a result that would put the Defendants in violation of the antitrust laws.

On the key question of anticompetitive effect, the result of the activities of the Defendants appears to the Court

to have been just the opposite, because if competition if measured with at least one ear or eye towards the effect upon the consumer, the price was the opposite of anti-competitive, because the prices dropped very substantially in the fashion which can only be explained by the activities of the Defendant bottle manufacturer.

This is simply an outline of the facts, which as I have heard the argument and read the record are not really in dispute, not really in genuine dispute. I apologize to all concerned for not making this decision last week. I thought I might well hear something more this morning, but I did not hear it.

The reasons that I have just indicated are [231] not, of course, a full analysis of the case, and they do not purport to be the only facts that the Court intends to find—undisputed facts upon which this Judgment is based.

Although I have often deprecated the practice of dismissing a case until you heard it, I guess I've always been a minority on that subject—on that score, and it's a first-time venture on my part into dismissal, because no showing had been made before the ruling of the entitlement to recover.

If the case could be tried to a jury in two or three days, I might still have said, "Let's let the jury decide it, instead of having the Court decide it. But the way you have, what I have reluctantly admitted, expenses in perhaps the millions for the further defense and prosecution of the case, I concluded that I had better vote my conscience on the merits right now, instead of going through that other process first.

So I will grant—I will dismiss the case, and I will request that counsel for the Defendants draw, as briefly as possible, proposed findings of fact in accordance with this ruling, and submit them to counsel for the Plaintiff, and let the Court have them—well, let's take—what is this Monday?

MR. ROBERTSON: Tuesday, Your Honor.

* * * *

No. 90-1044

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

SEWELL PLASTICS, INC.,

Petitioner,

v.

THE COCA-COLA COMPANY, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

William M. Dreyer
W. Thomas Haynes
THE COCA-COLA COMPANY
One Coca-Cola Plaza, N.W.
Atlanta, Georgia 30301
(404) 676-2121

Attorneys for Respondent The Coca-Cola Company

E. Osborne Ayscue, Jr.
SMITH HELMS MULLISS & MOORE
227 North Tryon Street
Charlotte, NC 28202
(704) 343-2000

Attorneys for Respondent Southeastern Container, Inc.

Jonathan M. Jacobson
(Counsel of Record)
Carolyn T. Ellis
Joshua D. Rievman
COUDERT BROTHERS
200 Park Avenue
New York, New York 10166
(212) 880-4884

Attorneys for the Bottler Respondents

January 29, 1991

32

COUNTERSTATEMENT OF QUESTIONS PRESENTED FOR REVIEW

Where several Coca-Cola bottlers form a cooperative to manufacture plastic soft drink bottles for themselves at a lower cost and, as a direct result, competition in the market increases substantially:

1. Does the formation of the cooperative violate the antitrust laws?

2. Do contractual provisions reasonably necessary for the formation and operation of the cooperative violate the antitrust laws?

3. Do injuries attributable to the increased competition in the market represent compensable "antitrust injury" to a competing seller?

STATEMENT PURSUANT TO RULE 29.1

Respondent The Coca-Cola Company has an ownership interest, excluding one hundred percent ownership, in each of the following domestic and Canadian companies: The Coca-Cola Bottling Company of New York, Inc.; Brucephil, Inc.; Coca-Cola Bottling Company Consolidated; Coca-Cola Enterprises, Inc.; Johnston Coca-Cola Bottling Group, Inc.; T.C.C. Beverages Ltd; Sunbelt Coca-Cola Bottling Company, Inc.; Rutgers Minority Investment Company; MESBIC Financial Corporation of Dallas; Albev Trading, Inc.; and China Ventures, L.P.

Respondent Alabama Coca-Cola Bottling Co. is a wholly owned subsidiary of Coca-Cola Enterprises, Inc. Respondent The Atlanta Coca-Cola Bottling Co. is a division of Coca-Cola Enterprises, Inc. Coca-Cola Enterprises, Inc. has an ownership interest, excluding one hundred percent ownership, in The Mid-Atlantic Coca-Cola Bottling Co., Inc. and The Coca-Cola Bottling Co. of the Mid South.

Respondents Biscoe Coca-Cola Bottling Co., Inc., Coca-Cola Bottling Co. of Mobile, Coca-Cola Bottling Co. of Nashville, Inc., Coca-Cola Bottling Co. of Roanoke, Inc., Columbus Coca-Cola Bottling Co., and Tarboro Coca-Cola Bottling Co., Inc. are wholly owned subsidiaries of respondent Coca-Cola Bottling Co. Consolidated. In addition, respondent Lincolnton Coca-Cola Bottling Co., Inc. has been merged into Coca-Cola Bottling Co. Consolidated.

Respondent Coca-Cola Bottling Co. of Asheville, N.C., is a division of Coca-Cola Bottling Co. Affiliated, Inc. which is a subsidiary of Sunbelt Coca-Cola Bottling Co. Respondents Coca-Cola Bottling Co. of Anderson, South Carolina and Mid South Coca-Cola Bottling Co. have been merged into Coca-Cola Bottling Co. Affiliated, Inc. Respondent Charleston Coca-Cola Bottling Co. has changed its name to Palmetto Bottling Co. and is also a subsidiary of Sunbelt Coca-Cola Bottling Co. Respondents Columbia Coca-Cola Bottling Co., Dorchester Coca-Cola Bottling Co., and Hamp-

ton Bottling Works, Inc. have been merged into Palmetto Bottling Co. Respondent Fayetteville Coca-Cola Bottling Co. is a subsidiary of Sunbelt Coca-Cola Bottling Co. Respondent Coca-Cola Bottling Co. of Wilson, Inc. is a subsidiary of Fayetteville Coca-Cola Bottling Co. An Australian corporation, C.C. Bottlers Ltd., through its wholly owned subsidiary, Diverse Products Ltd., owns approximately 27% of Sunbelt Coca-Cola Bottling Co.

There are no parent or subsidiary corporations to be listed for the following respondents: Southeastern Container, Inc.; Aberdeen Coca-Cola Bottling Co., Inc.; Carolina Coca-Cola Bottling Co., Inc.; Coca-Cola Bottling Co. United, Inc.; Coca-Cola Bottling Works of Tullahoma, Inc.; Durham Coca-Cola Bottling Co., Inc.; Eastern Coca-Cola Bottling Co., Inc.; Orangeburg Coca-Cola Bottling Co., Inc.; Plymouth Coca-Cola Bottling Co., Inc.; Rock Hill Coca-Cola Bottling Co.; Roddy Manufacturing Co.; Coca-Cola Bottling Co. of Johnson City, Tennessee; Sanford Coca-Cola Bottling Co.; and The Coastal Coca-Cola Bottling Co., Inc.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-1044

SEWELL PLASTICS, INC.,

Petitioner,

v.

THE COCA-COLA COMPANY, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

Petitioner Sewell Plastics is the nation's largest manufacturer of plastic soft drink bottles. Its complaint in this case alleged that 34 Southeast area Coca-Cola bottlers violated the antitrust laws by forming a cooperative—Southeastern Container—to make plastic bottles for themselves. Southeastern was established in 1982 by a group of small to mid-sized Coca-Cola bottlers who wanted to reduce their packaging costs. As a result of Southeastern's formation, competition in the plastic bottle market has increased dramatically. As Sewell concedes, *all* purchasers are now paying much lower bottle prices, total output in the market has increased sharply, market concentration has declined, and consumers

are paying much lower prices for soft drinks in plastic bottles.

In a detailed opinion, the district court granted summary judgment and dismissed the complaint. The court of appeals unanimously affirmed on the opinion below. The lower courts' decision was correct, does not conflict with any decision of this Court or any court of appeals, and presents no question of importance warranting further review. Certiorari should be denied.

STATEMENT OF THE CASE

Counterstatement of Facts

Acknowledging that it seeks "*de novo* scrutiny of the evidence" in this Court (Pet. 10), Sewell's Petition presents a version of the facts which the courts below specifically rejected, even while construing the evidence as favorably as possible to Sewell. (Pet. App. 29a.) A Counterstatement of Facts is therefore necessary, particularly in light of several significant misstatements of the record in the Petition.

1. ***Events prior to Southeastern's formation***. From 1977 to 1982, Sewell was the "dominant" manufacturer of plastic soft drink bottles in the Southeast, with an overall market share exceeding 50% and a share of the Coca-Cola bottler business of more than 90%. (Pet. App. 31a-33a.) During this period, prices increased significantly, from $243 per thousand (24.3¢ per bottle) in 1977-78 to a list price of $320 per thousand (32¢ per bottle) in 1981 (with discounts for some bottlers). (*Id.* 33a.) By 1980-81, the Bottler Defendants, a group of mostly small and medium-sized bottlers, were typically paying in excess of $300 per thousand (30¢ per bottle). (*Id.*; Record 1054-55, 2231-32, 2610, 2776, 5348.)

Not all bottlers were paying these high prices. A number of bottler groups operating "canning cooperatives" (jointly-owned facilities for filling soft drink cans) formed cooperative ventures to manufacture their own bottles. The first of

these "self-manufacturers" was Carolina Packaging, formed by a group of Southeast area Pepsi bottlers in late 1978. Carolina Packaging's founders were also members of Carolina Canners, a Pepsi "canning cooperative." Two early Coca-Cola self-manufacturers similarly had canning co-op origins: Western Container in Texas and Gulf States in Mississippi. (Pet. App. 35a.)

Plastic bottle-making cooperatives evolved out of canning cooperatives for a simple reason. A considerable amount of plastic bottle volume is required to reach minimum efficient scale, and few bottlers have sufficient volume on their own. Canning cooperatives were formed to allow bottlers to aggregate sufficient volume to justify the construction of high-speed canning lines. (Record 1854-55.) With most of the volume justifying consideration of plastic bottle self-manufacture already aggregated for canning purposes, it was logical for the canning co-ops to consider taking this next step. And several did.

2. ***Formation of Southeastern.*** The leaders in the formation of Southeastern were the members of a South Carolina Coca-Cola canning co-op known as South Atlantic Canners (SAC). In 1980-81, while these bottlers were paying prices of about 30¢ per two-liter bottle, they were reading in trade journals that their Pepsi competitors in Carolina Canners were making their own two-liter bottles for only 20¢ to 25¢ apiece. This gross disparity—5¢ to 10¢ per bottle—was a serious concern. (*Id.* 5250-52, 5286, 5379.)

The SAC bottlers decided to pursue the options available "to reduce packaging costs and better compete with Carolina Canners." (*Id.* 5296; Pet. App. 35a.) They initially considered entering into a joint venture with Sewell, but Sewell refused. It offered instead only a small reduction in price. (Record 5315-16, 5322; Pet. App. 48a.) After pursuing various other possibilities, the SAC bottlers decided to establish a self-manufacturing facility. To direct the effort, they hired John Dunagan, the founder and president of Western Container.

In early 1982, Dunagan developed a proposal for SAC. It was based on securing the bottlers' commitments for an annual volume of 48 million bottles. Sewell recognized that SAC needed substantial volume commitments to support an efficient plant. To sabotage the project, therefore, Sewell developed an "In-House PET Strategy" designed "to break up the in-house group through pricing concessions to key members." (Record 5337.) The plan was to capture the business of the larger potential members "at pricing levels which make the investment of self-manufacture unattractive, and prohibit South Atlantic Canners from obtaining the necessary volume to support machinery." (*Id.* 5331, 5342; Pet. App. 39a.) Several bottlers—including the three largest Coca-Cola bottlers in the area—accepted Sewell's offers. But just enough of the others remained, and a decision was made to proceed.

3. ***Southeastern's supply contracts.*** The evidence is uncontroverted that Southeastern developed its supply contracts to obtain commitments of sufficient volume to justify the expensive investment required in new plant and equipment. (*E.g.*, Record 1856-57, 2759-60.)[1] The supply contracts were patterned after the Western Container and Gulf States contracts, which provided that the new ventures would account for 80% of the member-bottlers' requirements. Southeastern's supply agreement had a five-year term, as did the Gulf States agreement; Western's agreement had a ten-year term. (Record 1082-83.) After expiration of the initial five-year period, Southeastern's agreement could be terminated at any time on 60 days notice. (Pet. App. 36a-37a.)

1 There were two other significant reasons for Southeastern's contracts. First, The Continental Group, owner of the patented technology for making the one-piece plastic bottles Southeastern's members decided to use, insisted on supply contracts covering the "major portion of [the bottlers'] requirements" for "more than four years" as a condition for licensing its technology. (Record 5339.) Second, Southeastern's bankers believed the contracts were "important" to "make sure [Southeastern] would be a feasible, practical lending opportunity." (*Id.* 3441-47.)

Obtaining volume commitments by using supply contracts was standard industry practice. Sewell's standard form contract (which it presented to Southeastern's principal founders, among others, when the co-op was being formed) lasted five years and covered 100% of the bottler's requirements. (Record 5271-83.) The other suppliers in the market regularly used long-term requirements contracts as well. (Pet. App. 37a.) Sewell's original proposal to the bottlers who formed Western Container was for a ten-year, 100% requirements contract. Southeastern's members received a 12-year, 90% proposal from another supplier. (Record 5214-16, 5305.)[2]

4. ***Southeastern's growth.*** From its start in 1982, Southeastern's philosophy was to reduce costs by operating on a streamlined basis using state-of-the-art technology. The strategy succeeded and the company soon became recognized as *the* most efficient producer in the country. Southeastern's prices plummeted to a point where they were typically 20 to 30 percent lower than those of outside suppliers, saving Southeastern's members millions of dollars each year. (*Id.* 2475, 5393, 6639.)

Although Southeastern's initial share of Sewell's "relevant market" (a gerrymandered area limited to the territories of Southeastern's membership) was only 11.9%, the significant disparity between Southeastern's prices and those of other suppliers led many new members—including several larger bottlers—to join. By 1986, Southeastern's members included what Sewell calls "virtually every Coca-Cola bottler within its market," and its market share reached 33.5%. (Pet. App. 45a-46a.)

5. ***Effect of Southeastern on competition.*** On every possible measure of competitive performance, market conditions have improved due to the increased competition Southeastern

---

2 Sewell implies—incorrectly—that the Pepsi cooperative, Carolina Packaging, did not use supply contracts. (Pet. 6 n.3.) In fact, like Southeastern, it initially used supply contracts and, like Southeastern, it charged each of its members the same delivered price. (Record 5350, 5463.) Unlike Southeastern, Carolina Packaging solicited business from non-members.

has generated. The evidence covers the period through the end of 1986, the cut-off date for discovery.

Price. Plastic bottle prices declined drastically. Southeastern's average net two-liter price dropped from $215 per thousand (21.5¢ per bottle) in 1982, to $191 in 1983, $164 in 1984, $147 in 1985, and $136 (13.6¢ per bottle) in 1986. Southeastern added three-liter and 16-ounce sizes in 1985, and the pricing followed the same trend. (Record 6628-32, 6639.)

The lower prices offered by Southeastern and other cooperatives forced Sewell and other suppliers to reduce costs and lower prices to prevent other bottlers from joining or forming cooperatives of their own. As a result, prices fell not just to co-op members, but *across the entire market.* Sewell's average two-liter prices dropped from $220 per thousand in 1982 to $173 in 1986. The prices of all other suppliers declined significantly as well. (Record 5449-51, 5466, 6639.)

Output. Plastic bottle output in the relevant market increased sharply from 1981 to 1986. Production rose from 128.6 million equivalent cases to 305.2 million cases, an increase of 137%. The increase in the Southeast was significantly greater than in the rest of the country. (Pet. App. 42a; Record 6655.)

Market concentration. The relevant market became substantially less concentrated following Southeastern's formation. From 1981 to 1986, the aggregate market share of the top four firms declined from 93.7% to 86.2%. The Herfindahl-Hirshman Index (HHI) dropped from 3321 to 2359. (Pet. App. 43a.)

Retail prices to consumers. Retail soft drink prices plummeted from 1982 to 1986. In the Southeast area as measured by A.C. Nielsen Co. (a slightly larger area than Sewell's "relevant market"), average prices for soft drinks sold in two-liter and three-liter plastic bottles declined 7.3%, from $3.53 per equivalent case to $3.27. In contrast, during the period from 1978 to 1980-81, when plastic bottle prices were increas-

ing, prices for soft drinks in plastic bottles increased as well. It was not until bottle prices started declining that the price to the consumer began to fall. In the period following Southeastern's formation, prices for soft drinks in plastic bottles declined, but prices for soft drinks in *other* packages *increased* 15.5%. In addition, prices for soft drinks in plastic bottles were significantly lower in the Southeast than in the rest of the country. (Record 6710; Pet. App. 43a-44a.)

Sewell's admissions of intense competition. The statistical evidence of increased competition is confirmed by repeated admissions in Sewell's formal Annual Reports and 10-K reports. For example, the Annual Report for 1982, the year Southeastern was formed, admitted increased price discounting and "the advent of competition resulting from the threat of self-manufacture." (Record 4893.) The 1983, 1984, and 1985 Annual Reports similarly referred to intense and "accelerated" price competition. (*Id.* 4902, 4906, 4912, 4930-31.) In 1986 and 1987, the company's 10-K reports admitted that "the plastic container industry is highly competitive," that there is "heavy price discounting" of plastic soft drink containers, and that "this price competition is expected to continue and may become even more intensive." (*Id.* 4980, 4991.)

Sewell argued below that these SEC filings did not specifically refer to Southeastern. But its Strategic Plan made it quite clear who Sewell was talking about:

> *Coca-Cola's Southeastern Co-operative in Asheville, NC, has set the standard for the new, low pricing.* The concept of this cooperative was to acquire the latest state-of-the-art equipment . . . . There are nine other co-operatives or in-house operations. None has had the market price impact of this particular operation.

(Record 6106 (preliminary version; emphasis added).) Southeastern's role was confirmed by numerous other Sewell documents and the testimony of its senior officers.[3]

3 Despite increasing sales and substantial profits, Sewell was unhappy with the competition it faced from co-ops generally and from Southeastern in

Proceedings Below

Following exhaustive discovery and extensive procedural wrangling (*see* Pet. App. 17a-29a), the district court granted defendants' motion for summary judgment and entered final judgment for the defendants under Fed. R. Civ. P. 54(b) (Pet. App. 77a). The court dismissed the per se price-fixing boycott claims for at least two separate reasons: (1) the challenged restraints were ancillary to the formation and operation of the Southeastern joint venture (*id.* 90a, 92a-93a), and (2) the Bottler Defendants were not substantial competitors of one another (*id.* 87a-89a, 92a). There were also two separate reasons for the dismissal of Sewell's rule of reason claims: (1) Sewell failed to present legally sufficient evidence of any adverse effect on competition (*id.* 56a-58a), and (2) on the undisputed evidence, the challenged arrangements "were reasonably necessary to achieve *pro*competitive benefits which clearly outweigh any anticompetitive effect" (*id.* 58a-60a, 67a). Finally, as a separate and alternative ground for dismissing all of Sewell's claims, the court held that Sewell failed to prove "antitrust injury" under this Court's decision in *Brunswick Corp. v. Pueblo Bowl-O-Mat*, 429 U.S. 477 (1977), and its progeny. (Pet. App. 64a-66a.)

---

particular. In June 1986, Sewell approached The Coca-Cola Company and threatened suit unless Coca-Cola agreed either to "stop the growth of the co-ops" or to enter into three-year requirements contracts for plastic bottles at excessive prices for Coca-Cola's wholly owned bottling subsidiaries. Coca-Cola refused. (Record 3253-71.) Sewell then filed this lawsuit, challenging Southeastern's very existence. Sewell's chief executive testified that the lawsuit seeks to have Southeastern dissolved or sold to Sewell. (*Id.* 3158-59.) After filing the suit, Sewell pursued a strategy of seeking to settle with Bottler Defendants who would commit all their volume exclusively to Sewell. Only one bottler, Wilmington Coca-Cola, agreed. In August 1987, Sewell proposed to resolve the lawsuit by *acquiring* Southeastern and entering into seven-year, 100% exclusive dealing arrangements with each of the Bottler Defendants (at prices significantly higher than Southeastern's). The defendants rejected the offer emphatically. (*Id.* 1923-25.) If allowed, the acquisition would have increased Sewell's share of its "relevant market" to 73%. (*Id.* 6673-74.)

The Court of Appeals for the Fourth Circuit affirmed unanimously "on the opinion of the district court" (Pet. App. 8a) in a per curiam, not-for-publication order. (*Id.* 1a-8a.) Sewell's petition for rehearing and suggestion for rehearing en banc were denied without dissent. (*Id.* 10a.)

REASONS FOR DENYING THE WRIT

This case raises no issue warranting Supreme Court review. Contrary to the argument in the Petition, this case does not present any broad question concerning the antitrust analysis of buyer agreements. The conduct at issue here is the creation of a new joint *production* venture. Nothing in the lower courts' opinions suggests any new or different standard for evaluating buyer conduct under the antitrust laws. The district court and court of appeals based their rulings on the simple insufficiency of Sewell's evidence and the well-established principle that conduct that increases competition in the marketplace, yielding lower prices to consumers, does not violate the antitrust laws. The opinions below were carefully based on the governing precedents and raise no conflict with any decision of this Court. The Petition does not even allege a conflict in the circuits.

Further review is especially inappropriate given the fact-bound nature of the decision below and Sewell's request that this Court engage in "*de novo* scrutiny of the evidence" contained in the massive record. (Pet. 10.) The evidence was carefully considered by the courts below and further review of their factual determinations is unwarranted. Certiorari should be denied.

I. THE COURTS BELOW HELD CORRECTLY THAT SEWELL FAILED TO PRESENT SUFFICIENT EVIDENCE OF A VIOLATION OF THE ANTITRUST LAWS OR ANTITRUST INJURY

Despite the characterizations in Sewell's Petition, this is not a case involving a naked agreement among competing buyers to purchase from the same supplier at the same price. At issue in this case is the creation of a joint production venture by a group of noncompetitors and the consequent addition of a new competitor to the marketplace. Nothing in the decision below suggests that concerted buyer arrangements are exempt from traditional antitrust scrutiny. The courts below upheld the challenged arrangement on well-established principles of general application.

To avoid summary judgment, Sewell had to present sufficient evidence of either a "per se" violation of the antitrust laws or an unreasonable restraint of competition under the "rule of reason." *E.g., Northwest Wholesale Stationers v. Pacific Stationery & Printing Co.*, 472 U.S. 284, 293-98 (1985); *Jefferson Parish Hospital v. Hyde*, 466 U.S. 2, 29 (1984). Sewell also had to demonstrate "antitrust injury." *E.g., Brunswick Corp. v. Pueblo Bowl-O-Mat*, 429 U.S. 477 (1977). The courts below properly held that Sewell's evidence was insufficient in each of these respects.

A. No Per Se Violation

1. Sewell's per se argument is simple. The Bottler Defendants have agreed to purchase 80% of their plastic bottles in certain sizes from Southeastern; therefore, to that extent, they are "boycotting" other suppliers. Furthermore, Southeastern, which is owned by the bottlers, sets prices for the bottles it sells; therefore, the bottlers are also guilty of "price fixing."

As this Court has consistently recognized, however, simple labelling of a practice as a "boycott" or "price fixing" does

not establish a per se violation. In the price fixing context, the Court has said:

> [T]his is not a question simply of determining whether two or more potential competitors have literally "fixed" a "price." As generally used in the antitrust field, "price fixing" is a shorthand way of describing certain categories of business behavior to which the *per se* rule has been held applicable. . . . Literalness is overly simplistic and often overbroad. When two partners set the price of their goods or services they are literally "price fixing," but they are not *per se* in violation of the Sherman Act. Thus, it is necessary to characterize the challenged conduct as falling within or without that category of behavior to which we apply the label "*per se* price fixing."

Broadcast Music, Inc. v. CBS, 441 U.S. 1, 8-9 (1979). The same is true in the boycott context as well. *E.g., FTC v. Indiana Federation of Dentists*, 476 U.S. 447, 458-59 (1986); *Northwest Wholesale Stationers*, 472 U.S. at 293-94.

The test to determine if a boycott is a "per se boycott" or if literal price setting is "per se price fixing" is whether "*the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output.*" *NCAA v. Board of Regents*, 468 U.S. 85, 100 (1984) (emphasis added); *Broadcast Music*, 441 U.S. at 19-20. The scope of per se condemnation is narrow. *Business Electronics v. Sharp Electronics*, 485 U.S. 717, 723 (1988); *Indiana Dentists*, 476 U.S. at 458-59. It is reserved only for "naked" restraints, i.e., restraints that are "manifestly anticompetitive," *Business Electronics*, 485 U.S. at 723; *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 58 (1977), and "have no purpose other than restricting output and raising prices," *Rothery Storage & Van Co. v. Atlas Van Lines*, 792 F.2d 210, 229 (D.C. Cir. 1986) (Bork, J.), *cert. denied*, 479 U.S. 1033 (1987).[4]

---

4 A focus on the tendency to restrict output is valid whether the conduct is by sellers or buyers. Selling-side market power is exercised when

2. As the courts below properly determined, neither the 80% requirements feature of Southeastern's supply contracts nor the fact that Southeastern sets a price for the products it sells can be characterized as a "naked" restraint subject to the per se rule. Each is instead "part of an integration of the economic activities of the [defendants] and [is] capable of enhancing the group's efficiency . . . ." *Rothery*, 792 F.2d at 229. In other words, each is "ancillary" to the joint venture, and must therefore be evaluated under the rule of reason. *Id.*; *see Business Electronics*, 485 U.S. at 729 & n.3; *United States v. Addyston Pipe & Steel*, 85 F. 271, 280-83 (6th Cir. 1898) (Taft, J.), *aff'd*, 175 U.S. 211 (1899).

"A restraint is ancillary when it may contribute to the success of a cooperative venture that promises greater productivity and output." *Polk Bros. v. Forest City Enterprises*, 776 F.2d 185, 189 (7th Cir. 1985) (Easterbrook, J.); *see Rothery*, 792 F.2d at 224, 229-30. Southeastern's supply agreements meet the test. The contracts provide Southeastern with reasonable assurance of volume, enabling it to obtain the equipment needed to commence and expand production of two-liter, three-liter, and 16-ounce plastic bottles.

The same analysis applies to the "price fixing" claim. The per se rule against price-fixing applies only where there "is an agreement to fix the price to be charged in transactions with third parties, not between the contracting parties themselves." *Sitkin Smelting & Ref. Co. v. FMC Corp.*, 575 F.2d 440, 446 (3d Cir.), *cert. denied*, 439 U.S. 866 (1978). The courts below were correct in holding that it is not price-fixing

sellers restrict market output (sales) to increase prices above the competitive level. Buying-side market power is exercised when buyers restrict market output (purchases) to depress prices below the competitive level. *See* 4 P. Areeda & D. Turner, *Antitrust Law* ¶ 964 (1980); R. Posner & F. Easterbrook, *Antitrust* 148-50 (2d ed. 1981).

when companies are "setting a price charged *to them* by a source of supply owned *by them.*" (Pet. App. 92a.)[5]

3. A "horizontal" agreement is not "always or almost always" likely to restrict competition and decrease output unless it is among firms that truly compete with each other. *See, e.g., Royal Drug Co. v. Group Life & Health Ins. Co.*, 737 F.2d 1433, 1436-37 (5th Cir. 1984), *cert. denied*, 469 U.S. 1160 (1985); *Lomar Wholesale Grocery v. Dieter's Gourmet Foods*, 824 F.2d 582, 590-95 (8th Cir. 1987), *cert. denied*, 484 U.S. 1010 (1988); *Mackey v. NFL*, 543 F.2d 606, 619 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801 (1977). In this case, therefore, per se treatment is inappropriate; the Bottler Defendants operate in exclusive territories and are "not essentially competitors." (Record 773.)[6]

The per se rule is applicable only in contexts where *marketwide* output restriction is likely. *Business Electronics*, 485 U.S. at 726-27; *see also id.* at 726 (*inter*brand—not *intra*brand—competition is "the primary concern of the antitrust laws"). If the Bottler Defendants collectively decide to restrict their joint output, they can affect only the output of *their own brand.* And any output reduction here would be senseless. A restriction in bottle purchases by the Bottler Defendants would damage their ability to meet downstream demand, and they would lose sales to Pepsi and other brands. Thus, as noncompetitors, the Bottler Defendants lack both the power and the incentive to restrict output

---

5 Contrary to Sewell's argument (Pet. 21-22), there is no requirement that a covenant be "necessary to 'market the product at all' " to be considered ancillary. This Court has specifically rejected such a "least restrictive alternative" test and held that the appropriate standard is whether the covenant is "*reasonably* necessary." *Broadcast Music*, 441 U.S. at 19 (emphasis added); *Sylvania*, 433 U.S. at 58 n.29; *see also Rothery*, 792 F.2d at 227-28.

6 Nothing in *FTC v. Superior Court Trial Lawyers Ass'n*, 110 S. Ct. 768 (1990), suggests a different result. Contrary to the argument in the Petition (Pet. 20), the defendants there were direct competitors, as this Court emphasized. 110 S. Ct. at 774-75.

marketwide. Restriction of market output is therefore unlikely, and the per se rule does not apply.

4. In *Northwest Wholesale Stationers,* this Court held that joint purchasing cooperatives are not illegal per se:

> Wholesale purchasing cooperatives such as [the defendant] are not a form of concerted activity characteristically likely to result in predominantly anticompetitive effects. Rather, such cooperative arrangements would seem to be "designed to increase economic efficiency and render markets more, rather than less, competitive." *Broadcast Music, Inc. v. CBS*, 441 U.S. 1, 20 (1979). The arrangement permits the participating retailers to achieve economies of scale in both the purchase and warehousing of wholesale supplies, and also ensures ready access to a stock of goods that might otherwise be unavailable on short notice. The cost savings and order-filling guarantees enable smaller retailers to reduce prices and maintain their retail stock so as to compete more effectively with larger retailers.

472 U.S. at 295. *Northwest* involved a joint *purchasing* cooperative formed by *competing* stationers. The Court's rationale applies with even greater force here, where the challenged conduct is the creation of a joint *production* venture (involving significantly greater potential for creating efficiencies) by a group of *noncompetitors.*

B. No Violation Under the Rule of Reason

Under the rule of reason, Sewell's burden was to demonstrate that defendants' conduct (1) had a substantial adverse effect on competition in the relevant market, and (2) was not reasonably justified by a need to achieve legitimate, procompetitive objectives. *E.g., Jefferson Parish Hospital v. Hyde*, 466 U.S. 2, 29-32 (1984); *Clamp-All Corp. v. Cast Iron Soil Pipe Institute*, 851 F.2d 478, 486 (1st Cir. 1988), *cert. denied,* 488 U.S. 1007 (1989). As the lower courts correctly ruled, Sewell failed in both respects.

1. *No adverse effect.* Sewell had the burden to show that defendants' conduct had the actual or probable effect of increasing prices, restricting output, or otherwise restraining competition substantially. Effects on price and output are the primary factors in determining whether competition has been restrained. *NCAA v. Board of Regents*, 468 U.S. 85, 107-08 (1984) ("[r]estrictions on price and output are the paradigmatic examples of restraints of trade"); *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 500-01 (1940) ("in general restraints upon competition have been condemned only when their purpose or effect was to raise or fix the market price"); *Standard Oil Co. v. United States*, 221 U.S. 1, 58 (1911). Analysis of market concentration and market power is also important because market power and increased market concentration may yield adverse price and output effects. *See, e.g., Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 768 (1984). The ultimate question is whether the plaintiff has demonstrated actual or probable *consumer* harm. *See, e.g., NCAA*, 468 U.S. at 107 ("Congress designed the Sherman Act as a 'consumer welfare prescription.' "). "The Sherman Act's very purpose is to help consumers, in part by bringing about low, nonpredatory prices." *Monahan's Marine v. Boston Whaler, Inc.*, 866 F.2d 525, 527 (1st Cir. 1989) (Breyer, J.).

Sewell failed to present any evidence of harm to consumers or to the competitive process in any respect. On the contrary, the uncontroverted evidence demonstrated that defendants' conduct *increased* competition substantially. (*See* pp. 5-7 above.) None of the arguments Sewell raises in this Court provides a basis for concluding otherwise.[7]

---

7 The lower courts' factual inquiry into the competitive impact of the challenged arrangements was made more straightforward by the fact that, at the time of the district court's judgment, the arrangements had been in effect for almost seven years. Virtually all of Southeastern's five-year contracts, in fact, had expired. Accordingly, the courts below were able to assess the *actual* effects of the challenged arrangements with reasonable assurance that the probable *future* effects would give rise to no competitive concerns. Even so, both courts examined the actual *and* potential effects of defendants' conduct in detail.

a. *Lower prices.* Sewell's principal contention is that "lower prices represent anticompetitive effects in joint buyer cases." (Pet. 23.) This argument was properly rejected by the courts below as an improper effort to obtain protection from legitimate price competition. *See Atlantic Richfield Co. v. USA Petroleum Co.*, 110 S. Ct. 1884, 1891 (1990).

"Low prices benefit consumers regardless of how those prices are set, and so long as they are above predatory levels, they do not threaten competition." *Id.* at 1892. Lower prices are harmful to consumers, and therefore anticompetitive, only if the lower prices are predatory (i.e., below competitive levels) or otherwise set so low that market output is reduced. *E.g., id.* at 1891-92; 4 P. Areeda & D. Turner, *Antitrust Law* ¶ 964 (1980). In this case, there was no such evidence. On the contrary, market output increased and there was no below-cost or subcompetitive pricing by Southeastern or any other supplier. (Pet. App. 40a-41a, 56a-58a.)

In the joint purchasing context, lower prices generally enhance competition by reducing the buyers' input costs and enabling them to lower prices to consumers. *Northwest*, 472 U.S. at 295. The procompetitive effects of lower prices are even more apparent where, as in this case, the context is the creation of a joint production venture as a new competitor in the marketplace. Lower prices here represent the process of competition in action. To allow a plaintiff to challenge as "*anti*competitive" the lower prices attributable to increased competition generated by a new entrant would be to subvert the purposes of the antitrust laws.

b. *Market power.* Sewell did not just fail to produce any evidence of actual harm to competition. *See Indiana Dentists*, 476 U.S. at 460-61. It also failed to demonstrate market power. That failure was fatal to its case under the rule of reason. As the courts below correctly recognized, "[w]ithout evidence of market power, there is no basis for finding 'undue' foreclosure of the relevant market." (Pet. App. 58a.) *Accord, e.g., Ryko Mfg. Co. v. Eden Services*, 823 F.2d 1215, 1233-35 (8th Cir. 1987), *cert. denied*, 484 U.S. 1026

(1988); *see Ball Memorial Hospital v. Mutual Hospital Ins.*, 784 F.2d 1325, 1334 (7th Cir. 1984) (Easterbrook, J.) ("[m]arket power is a necessary ingredient in every case under the Rule of Reason").

"Market power is the ability to raise prices above those that would be charged in a competitive market" or, similarly, to depress prices below competitive levels. *NCAA*, 468 U.S. at 109 n.38. As the courts below noted, however, Sewell did not even allege that Southeastern could sell its bottles at prices beyond competitive levels. (Pet. App. 45a-49a.) Instead, Sewell relied exclusively on percentage statistics.[8]

Power over price cannot be determined on the basis of market share percentages alone. *E.g., Ball Memorial,* 784 F.2d at 1335-36. Even a market share of 100% may not indicate market power if other facts are shown. *See Metro Mobile CTS v. NewVector Communications*, 892 F.2d 62 (9th Cir. 1989). This Court has declined to find market power in cases involving market shares similar to the 32% at issue here. *Jefferson Parish*, 466 U.S. at 26-27 & n.43 (30%); *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594, 611-13 (1953) (40%); *see also Cargill, Inc. v. Monfort of Colorado*, 479 U.S. 104, 119-20 n.15 (1986) (28.4%).

---

8 Sewell claims that the relevant percentage share here is 40%, the collective soft drink market share of Southeastern's members. (*E.g.*, Pet. *i*, 10.) Southeastern's contracts cover only 80% of this volume, however, and the pertinent share for foreclosure analysis is therefore at most 32%. There was no evidence of any "implied" agreement to purchase 100% rather than 80%. During the 1982-1986 period, 19.7% of the bottle purchases of Southeastern's members were from other suppliers, predominantly Sewell. (Pet. App. 86a; Record 6685.) A figure of 32% "foreclosure" is itself an exaggeration. Because of staggered expiration dates, Southeastern's contracts covered 32% of the market for only about 18 months (Spring 1986 to Fall 1987), after which the figure declined. Moreover, the contracts were never rigorously enforced. The record reveals over 20 instances where the 80% "requirement" was not fulfilled, all without any threatened "penalty" or "financial assessment" by Southeastern. (Record 6686-87.) Sewell misstates the record in arguing that one bottler, Anderson, was precluded from accepting a lower price offered by Sewell. (Pet. 8-9, 26 n.12.) In fact, the Anderson bottler accepted Sewell's offer; Anderson started buying again from Southeastern only after Southeastern's price decreased. (Record 2939-40, 3846.)

In this case, the undisputed facts indicate that Southeastern's market share is unlikely to exceed 40% (since Southeastern sells only to Coca-Cola bottlers), and that a 40% (or even 50%) share in this market confers no power to raise prices above (or decrease prices below) competitive levels. (Pet. App. 45a-49a.)

Sewell's response is to say that Southeastern has the "*right* to set the price which each of the 33 bottlers must pay . . . ." (Pet. 24.) Obviously every company has the "right" to determine the prices it will charge. That right is not *market power*, however, unless there is proof of the ability to increase prices above (or depress prices below) *competitive levels*—proof that Sewell could not and did not present.

c. *Harm to competitors.* Sewell also argues that competitors were harmed. Since the antitrust laws are for the protection of competition, not competitors, Sewell's allegations are insufficient as a matter of law. *Atlantic Richfield*, 110 S. Ct. at 1891; *Copperweld*, 467 U.S. at 767.

In this case, moreover, there was no evidence of any significant competitor harm. It was undisputed that the aggregate sales of Southeastern's competitors in the Southeast area increased every year, and that Sewell's own production expanded from 65.2 million cases in 1981 to 88.2 million in 1986. (Record 1687.) Significantly, there was no evidence that *any* competitor was ever unprofitable. Sewell itself was (and is) extremely profitable. (Pet. App. 49a-50a.) In *Atlantic Richfield*, in contrast, numerous competitors were driven out of business. *See* 110 S. Ct. at 1896-97 n.5 (Stevens, J., dissenting). Nevertheless, this Court held that injury to *competition* had not been shown. *Id.* at 1892-93.

Sewell suggests that, in this case, competitor harm is a matter of public importance warranting a grant of certiorari. It argues that if Southeastern's operation is not declared illegal, then in some areas Coke and Pepsi bottlers might both form cooperatives; independent bottle-makers would not have sufficient remaining business to continue operating, the argument goes, and "bottlers of lesser known brands would have

nowhere to turn for bottles." (Pet. 16-17.) Sewell advanced no such argument in the courts below, and for good reason: there is no evidence to support it.

In the entire United States, the only market in which both Coke and Pepsi bottlers have formed cooperatives is the market at issue here, the Southeast area. This market has supported four other independent suppliers, each of which had significantly greater sales in 1986 than in 1981, before Southeastern was formed. (Record 6620.) Nor was there any harm to bottlers of "lesser known" brands. Sales of non-Coke, non-Pepsi soft drink brands in plastic bottles increased at a rate 71% greater in the Southeast than in the rest of the country. (*Id.* 6619.)

Southeastern's formation may have made its competitors less comfortable. Added competition always does. In the more intensely competitive environment, Southeastern's competitors could no longer sit back and leave well enough alone. They were forced to cut costs and become more efficient. But when they did, they were rewarded with increased profits. Consumers were rewarded as well.

d. *Quality and research & development.* Finally, Sewell argues that there have been adverse effects on quality and on research and development. Both arguments suffer from the same flaw: a failure to show any adverse effects in "the market as a whole." *Jefferson Parish*, 466 U.S. at 31. Sewell's evidence established nothing more than that a few suppliers curtailed "R&D" expenditures and that Southeastern experienced an occasional quality problem.[9] In the market as a

9 The Petition misrepresents the record in connection with the quality issue, claiming that one Southeastern bottler was experiencing a bottle explosion problem with Southeastern's bottles and, yet, was denied "permission" to purchase from Sewell. (Pet. 9.) The evidence is uncontroverted that the bottler in fact started buying from Sewell immediately. The problem, moreover, had nothing to do with the quality of Southeastern's bottles; it related to factors at the bottler's filling facility which impaired the performance of the one-piece bottle Southeastern used. (Record 2218, 2845-48, 3377-78.) Overall, Southeastern's quality was (and is) excellent. (*Id.* 2899-900, 5399.)

whole, however, technological improvements accelerated and quality competition increased. (Pet. App. 44a-45a.) The lower courts were entirely correct in concluding that Sewell's evidence of harm to competition was legally insufficient.

2. ***Procompetitive justifications.*** The courts below properly held, as an alternative ground for summary judgment under the rule of reason, that Southeastern's supply contracts were reasonably justified as a matter of law. (*Id.* 58a-59a.)

This Court has repeatedly recognized that multi-year supply contracts used to induce investment in the establishment or expansion of production facilities are reasonable and justified. *See, e.g., United States v. General Dynamics Corp.*, 415 U.S. 486, 499-500 (1974); *United States v. El Paso Natural Gas Co.*, 376 U.S. 651, 660 (1964); *Standard Oil Co. v. United States*, 337 U.S. 293, 306-07 (1949). In this case, Sewell's own chief executive admitted that long-term supply contracts are "prudent" in light of the need for volume and the substantial investment involved. (Record 3162-63, 3199-201.) There was no contrary evidence.

C. No Antitrust Injury

As a separate, alternative ground for summary judgment on all of Sewell's claims, the courts below held that Sewell had failed to show "antitrust injury" under *Brunswick Corp. v. Pueblo Bowl-O-Mat*, 429 U.S. 477 (1977) and *Cargill, Inc. v. Monfort of Colorado*, 479 U.S. 104 (1986). (Pet. App. 63a-66a.) The essence of the antitrust injury requirement is that a plaintiff must demonstrate an injury that "reflects the *anticompetitive effect*" of the challenged conduct. *Brunswick*, 429 U.S. at 489 (emphasis added). If the injury is attributable to continued or increased competition, the plaintiff's case must be dismissed. *Cargill*, 479 U.S. at 115-17.

Brunswick holds squarely that a plaintiff may not claim damages resulting from the presence of an additional competitor in the market. 429 U.S. at 486-89. Yet that is exactly what Sewell did. Despite Sewell's present denials that it is complaining about Southeastern's presence in the market,

Sewell's damages theory below was in fact based *entirely* on the additional profits Sewell said it would have made if Southeastern *had never been formed*; Sewell presented no evidence of any other source of injury or damage. (Record 2594-604.) Under Sewell's damages theory, prices for bottles would have been much higher than they were in the real world, the market would have been far more concentrated, and Sewell would have had a near monopoly. (*Id.* 2594-604, 3768-882, 6666.) Sewell's damages theory, in short, was premised on *lessened* competition. As in *Brunswick*, it would be "inimical to the purposes of [the antitrust] laws" for this kind of claim to stand. 429 U.S. at 488. The ruling that Sewell failed to demonstrate "antitrust injury" was correct, is sufficient by itself to sustain the judgment, and does not warrant further review.

II. FURTHER REVIEW OF THE LOWER COURTS' FACTUAL DETERMINATIONS IS UNWARRANTED

Sewell's Petition expressly asks the Court to engage in a "*de novo*" review of the evidence. (Pet. 10, 26-27.) In this case, that would entail consideration of a massive record which, as "condensed" in the court of appeals by the deferred appendix method, produced a 20-volume joint appendix containing 6973 pages.

The factual review sought by Sewell is inappropriate. Certiorari is not granted "to review evidence and discuss specific facts." *United States v. Johnston*, 268 U.S. 220, 227 (1925). This principle is especially appropriate here, where the district court meticulously examined the evidence in a 71-page opinion and a unanimous court of appeals affirmed per curiam on the opinion below. *See* R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* 217-18 (6th ed. 1986).

Sewell argues that it was inappropriate for the district court to assess the legal sufficiency of Sewell's evidence—even though all the evidence on which the court relied was stipulated, admitted, or uncontroverted, and "viewed in the

light most favorable to plaintiff." (Pet. App. 29a.) As Sewell would have it, summary judgment is *never* permissible in a rule of reason case; "reasonableness," rather, should *always* be for a jury to decide. (Pet. 26-27.) Fortunately, Sewell's view is not the law. *See, e.g., NCAA*, 468 U.S. at 109-10 n.39; *Barry v. Blue Cross*, 805 F.2d 866, 871 (9th Cir. 1986). Under the applicable precedents, a district court *must* assess the legal sufficiency of a plaintiff's evidence when a properly supported motion for summary judgment has been made. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Anderson v. Liberty Lobby*, 477 U.S. 242, 247-52, 256-57 (1986); *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 585-88 (1986).

The district court and court of appeals engaged in a proper analysis of the evidence, applied the appropriate rules of law, and reached the correct result. Nothing in their opinions merits further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

Jonathan M. Jacobson
(Counsel of Record)
Carolyn T. Ellis
Joshua D. Rievman
COUDERT BROTHERS
200 Park Avenue
New York, New York 10166
(212) 880-4884

Attorneys for The Bottler Respondents

William M. Dreyer
W. Thomas Haynes
THE COCA-COLA COMPANY
One Coca-Cola Plaza
Atlanta, Georgia 30313
(404) 676-2121

Attorneys for Respondent The Coca-Cola Company

E. Osborne Ayscue, Jr.
SMITH HELMS MULLISS & MOORE
227 North Tryon Street
Charlotte, NC 28202
(704) 343-2000

Attorneys for Respondent Southeastern Container, Inc.

January 29, 1991

(4)

No. 90-1044

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

SEWELL PLASTICS, INC.,
Petitioner,
v.

THE COCA-COLA COMPANY (doing business through its division, COCA-COLA USA); SOUTHEASTERN CONTAINER, INC.; ABERDEEN COCA-COLA BOTTLING CO., INC.; ALABAMA COCA-COLA BOTTLING COMPANY; BISCOE COCA-COLA BOTTLING COMPANY, INC.; CAROLINA COCA-COLA BOTTLING CO., INC.; COCA-COLA BOTTLING COMPANY CONSOLIDATED; COCA-COLA BOTTLING COMPANY OF ANDERSON, SOUTH CAROLINA, INC.; COCA-COLA BOTTLING COMPANY OF ASHEVILLE, N.C.; COCA-COLA BOTTLING COMPANY OF MOBILE; COCA-COLA BOTTLING COMPANY

(Caption Continued on Inside Cover)

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

REPLY BRIEF OF PETITIONER

WILLIAM L. RIKARD, ESQ.
PARKER, POE, THOMPSON, GAGE & PRESTON
2600 Charlotte Plaza
Charlotte, NC 28244
(704) 372-9000

ROBERT L. HOEGLE, ESQ.
Counsel of Record
PETER ARON, ESQ.
OLWINE, CONNELLY, CHASE, O'DONNELL & WEYHER
750 Seventh Avenue
New York, New York 10019
(212) 261-8000

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

of Nashville, Inc.; Coca-Cola Bottling Company of Roanoke, Inc.; Coca-Cola Bottling Company of Wilson, Inc.; Coca-Cola Bottling Company United, Inc.; Coca-Cola Bottling Works of Tullahoma, Inc.; Columbia Coca-Cola Bottling Company; Columbus Coca-Cola Bottling Company; Dorchester Coca-Cola Bottling Company; Durham Coca-Cola Bottling Company, Inc.; Eastern Carolina Coca-Cola Bottling Company, Inc.; Fayetteville Coca-Cola Bottling Company; Hampton Bottling Works, Inc.; Lincolnton Coca-Cola Bottling Co., Inc.; Mid South Coca-Cola Bottling Company; Orangeburg Coca-Cola Bottling Co., Inc.; Plymouth Coca-Cola Bottling Co., Inc.; Rock Hill Coca-Cola Bottling Co.; Roddy Manufacturing Company; Sanford Coca-Cola Bottling Company; Tarboro Coca-Cola Bottling Company, Inc.; The Atlanta Coca-Cola Bottling Company; The Coastal Coca-Cola Bottling Company; The Coca-Cola Bottling Company of Henderson, Inc.; The Coca-Cola Bottling Company of Johnson City, Tennessee; and Wilmington Coca-Cola Bottling Works, Inc.,

Respondents.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **Page**

REPLY BRIEF OF PETITIONER

In this Reply we respectfully urge:

I. An exclusive joint buying agreement is not excused from *per se* principles just because the conspiring buyers agree to buy from a "joint production venture."

II. Southeastern's so-called "success" only further shows how and why a sizable, exclusive joint buying agreement eliminates or restricts competition.

III. The Eleventh Circuit's recent decision in *Key Enterprises of Delaware, Inc. v. Venice Hospital,* 919 F.2d 1550 (11th Cir. December 28, 1990), directly conflicts with the Fourth Circuit's ruling here, further refuting Respondents' arguments.

I. SOUTHEASTERN'S "JOINT PRODUCTION VENTURE" DOES NOT EXCUSE *PER SE* TREATMENT OF THE SEPARATE BUYING AGREEMENT.

If *per se* principles still apply at all to *buying* agreements, what could be more inherently anti-competitive than a horizontal buying agreement which compels *every* participant to buy from the chosen supplier, regardless of *anything* which a single competing supplier could (and in this case, did) offer?

Respondents offer no genuine answer. They merely assert in conclusory fashion that the "scope of *per se* condemnation is narrow" and ordinarily does not apply to joint ventures. (Brief in Opp. 11.) But it is *not* the Southeastern bottle-making joint venture which is in issue; in issue is the separate and distinct buying agreement. It is also no answer that Southeastern has been successful and as a result, has "promoted" competition. As this Court explained in *FTC v. Superior Court Trial Lawyers Association,* 110 S. Ct. 768, 781 (1990), anti-competitive agreements are designed to achieve success for their beneficiaries.

Simply because the bottlers are not competitors at the retail level does not take away from the discouragement and elimination of competition at the *buying* level. This Court long ago made clear that the impact or effect of a plainly anti-competitive agreement on *another* level in the distribution chain cannot save *per se* condemnation. *United States v. Topco Associates, Inc.*, 405 U.S. 596, 609-10 (1972).

When all is said, this Court need look no further than the face of the Respondents' buying agreement to see that—as intended—it would and does "almost always" restrict or eliminate competition (*Northwest Wholesale Stationers, Inc. v. Pacific Stationery and Printing Co.*, 472 U.S. 284, 289-90 (1985)), and therefore constitutes a *per se* violation.

II. SOUTHEASTERN'S "SUCCESS" ONLY FURTHER SHOWS HOW AND WHY THE EXCLUSIVE JOINT BUYING AGREEMENT IS INHERENTLY ANTI-COMPETITIVE.

The pervasive theme of Respondents' opposition—that the Southeastern cooperative, devoid of competition, has become a big success, yielding lower prices and related consumer benefits (Brief in Opp. 1-7)—further shows why the Writ should be granted: *Every* exclusive horizontal buying agreement of any meaningful size and duration likely would yield prices lower than the participants could obtain individually. In addition, because the excluded suppliers are left to compete in a shrunken market segment (here, a market reduced by about *40%*), competition among them in *that* segment would naturally intensify, likely yielding lower prices there, too. In this way the agreement may be said to have "caused" lower prices in the overall market.

However, these superficially desirable effects on price are nothing but the natural and likely effects of the elimination—not promotion—of competition through the exclusive horizontal buying agreement. What is more, these effects are the same *regardless* of whether the

group's chosen supplier is a joint production venture or an independent supplier. In *either* case, the supplier has the unmistakable advantage of having his "success" assured. The supplier thus benefits from the certain knowledge that it has guaranteed sales volume in hand, allowing it to operate at maximum efficiencies.

Having such "success" assured, furthermore, also means that the chosen supplier need not be especially concerned with product quality or consumer preferences. This case readily proves it: Southeastern's buyers must take—and hence pass on to consumers—the type of bottle disfavored by the consuming public, which overwhelmingly prefers the type of bottle made by Sewell. Indeed, according to an independent consultant engaged by one large bottler, using the Southeastern bottle directly caused it to lose market share to competition. (Record 2489-93, 2499-510, 2551-54, 3592-611, 3612-13, 6403-06, 6433-66, 6469-84.)

While Southeastern's management is proclaiming the "success" it enjoys because it has a "high volume captive market" (Record 3684-92), field personnel of The Coca-Cola Company are not applauding: they concluded that Southeastern's bottles experience "a lot of failures and/or quality problems which seems to be related to the fact that the bottler is almost required to take anything that is delivered." (Record 5003R.) It is undeniable that the incentive to produce the best quality products is just not there when the buyer must take, in Coca-Cola's own words, "anything that is delivered."

Naturally, too, the chosen supplier can achieve lower costs than genuine competitors. But ultimately, one or more other suppliers will get discouraged, reducing their commitment to the business, or even determining to get out of the business.

All of these effects not only occurred in this case—as evidenced in, *inter alia*, *four* affidavits ignored by the lower courts (and by Respondents' Brief in Opposition) (Record 1954-58, 1961-63, 1977-78, 2060-65), *but they*

represent the likely effects of every sizable exclusive horizontal buying agreeemnt which permits no competition.[1]

No legitimate justification exists to compel each buyer to buy from the chosen supplier for five years, regardless of what another supplier could offer. Having a "captive market" is not "necessary" to the formation and operation of *any* supplier, whether a joint production venture or otherwise. The belief that a five-year "captive market" was necessary in order for the joint production venture to become viable only evidences the belief that the venture would be unable to stand on its own feet, a "justification" precisely rejected by this Court in *Otter Tail Power Co. v. United States*, 410 U.S. 366, 380 (1973):

> [The Sherman] Act assumes that an enterprise will protect itself against loss by operating with superior service, lower costs, and improved efficiency.

This is because antitrust laws protect the competitive process itself, the "ordinary give and take of the market place." *FTC v. Indiana Federation of Dentists*, 476 U.S. 447, 459 (1986). Absolutely *nothing* in Respondents' fact-laden Opposition can mask or divert attention from what happened to the *competitive process itself* in this case.

---

[1] The four affidavits alone—explaining how the competitive process was so severely diminished that suppliers determined to get out of the business—evidence the substantial fact issues which abounded.

For another example of sharply disputed facts, although Respondents glibly refer to themselves as "small to mid-sized bottlers," at least three of them—among the largest in the entire Coca-Cola system—had enough volume to readily justify individual bottle-making operations, according to Coca-Cola's *own* study. (Record 6727-833.) Even the district court acknowledged the parties' fact dispute over the minimum volume necessary to economically justify a bottle-making operation. (App. 36a.)

Respondents' conclusory assertion that no genuine fact issues existed (Brief in Opp. 21-22) is disingenuous. (Of course, the existence of fact issues was expressly recognized in the district court's *first* summary judgment opinion.) (App. 91a-93a.)

Compare the competitive process BEFORE and AFTER the Southeastern arrangement:

BEFORE

The Market	*The Competitive Process*
Several Suppliers Compete For *100%* of the Entire Market	• buyers and sellers negotiate individual contracts. (Record 1738, 2154, 2902-04, 3130-32.) • buyers can switch suppliers for a lower price at any time. (Record 1953-55, 1969-70, 1972-75, 1987-90, 2902-04, 3397-99.) • buyers make individual choices of product type and services. (Record 1954, 1956, 1960, 1977-80, 3462-63, 3471-72, 3482-83, 3910.)

AFTER

The Market	*The Competitive Process*
In Southeastern's Captive Market (Now Representing Roughly 40%): No Competition At All Independent Suppliers Can Compete For the Remaining 60% Segment Only	• no single independent supplier can compete in Southeastern's segment *regardless of price* (or other consideration). (Record 1961, 5638.) • Southeastern buyers forego individual choice of product type and service. (Record 2664-67.) • Southeastern buyers must take what is delivered. (Record 5003R.) • Some "want out altogether," but cannot withdraw. (Record 3683.)

Taking at face value Respondents' proclamation of Southeastern's success by virtue of a "high volume captive market," we respectfully ask whether such "success" from the outright elimination of competition in a large market segment is what the antitrust laws contemplate, and we urge that the Writ be granted to instruct that they do not.

III. THE ELEVENTH CIRCUIT'S RECENT DECISION IN *KEY ENTERPRISES OF DELAWARE, INC. v. VENICE HOSPITAL* IS DIRECTLY IN CONFLICT WITH THE FOURTH CIRCUIT'S RULING HERE, FURTHER REFUTING RESPONDENTS' ARGUMENTS.

In its recent *Key Enterprises* decision, the Eleventh Circuit was faced with a joint venture (between a hospital and a medical equipment supplier) to supply medical equipment to patients. The circumstances were similar to this case:

- the joint venture strategy was to sell to a "captive" market, there comprised of the hospital's patients (*Key Enterprises*, 919 F.2d at 1553-55);
- the captive customers accounted for about 39% of the market (*Id.* at 1553);
- prices "have actually gone down" (*Id.* at 1560 n.7); and
- the market became less concentrated after the joint venture was formed, under the Herfindahl-Hirshman Index. (*Id.*)

In reversing the district court's grant of judgment n.o.v. to defendants, the Eleventh Circuit relied on established antitrust principles which were rejected or disregarded by the Fourth Circuit here, and which are directly at odds with Respondents' arguments:

A. "Legitimacy" of the Joint Production Venture. As Respondents do here (Brief in Opp. 9), the *Key Enterprises* defendants sought to shift the Court's focus from the challenged agreement to the "legitimacy" of the joint venture itself. The Eleventh Circuit acknowledged, however, that the joint venture was "legitimate," but properly observed that what was in issue was "the *manner* in which the defendants implemented the joint venture . . . ." *Key Enterprises*, 919 F.2d at 1558 (emphasis added).

Unlike the Eleventh Circuit, however, the district court and Fourth Circuit failed to make a clear distinction between the joint production venture and the horizontal agreement used to "implement it." Instead, the district court, approved by the Fourth Circuit, simply declared that because the formation of Southeastern was legitimate, the buying agreement—as a matter of law—was "reasonably necessary" to achieve "legitimate pro-competitive purposes." (App. 58a-59a.)

The same argument would have entitled defendants in *Key Enterprises* to prevail as a matter of law. Recognizing that this kind of "justification" has been rejected since at least *Otter Tail Power Co. v. United States*, *supra*, the Eleventh Circuit reinstated a jury verdict for plaintiff. In stark contrast, Sewell was deprived of even presenting its case to a jury.

B. Antitrust Injury. By focusing on the Southeastern bottle-making facility instead of the horizontal buying agreement, the lower courts and Respondents recharacterize Sewell's case as a challenge to Southeastern's "presence" as a competitor in the market. As a result, the lower courts ruled, and Respondents now continue to urge (Brief in Opp. 20-21) that Sewell has not shown "antitrust injury," because it is really complaining about competition arising out of Southeastern's presence in the market. The Eleventh Circuit in *Key Enterprises* found the same reasoning to be erroneous:

> [Plaintiff] claims that defendants' practices have unreasonably restricted competition by channeling patient choice to defendants and by excluding all competing [suppliers'] access to [defendants'] patients. The antitrust laws were intended to prevent unreasonably exclusionary practices. [Plaintiff's] injury flows directly from that which makes the defendants' acts unlawful.

Key Enterprises, 919 F.2d at 1559.

Here, too, Sewell's injury could not flow more directly from the exclusive horizontal buying agreement which constitutes the violation: as in *Key Enterprises*, Sewell

and other independent suppliers were unable to have access to the captive customers. *See also Northwest Wholesale Stationers, Inc. v. Pacific Stationery and Printing Co.*, 472 U.S. 284 (1985); *Atlantic Richfield Co. v. USA Petroleum Co.*, 110 S. Ct. 1884 (1990).[2]

C. Consumer Choice. There is also no reconciling the conflicting holdings of the Fourth and Eleventh Circuits on whether restricting consumer choice represents injury to competition. *Preliminarily, here, the district court expressly acknowledged that consumers preferred the type of bottle made by Sewell and other independent manufacturers.* (App. 45a.) [3]

Turning the antitrust laws upside down, however, the lower courts actually ruled that *because* the consumer *had* to buy Coca-Cola products in the disfavored Southeastern-type bottle, there was no "consumer choice" injury because the consumer went ahead and bought Coca-Cola products in the disfavored package anyway.[4] The

---

[2] In fact, Sewell had much more direct evidence of injury than the plaintiff in *Key Enterprises*. In at least three instances there was evidence of bottlers' desire to resume buying from Sewell, with one bottler executive's notes stating, "We want out [of Southeastern] altogether." (Record 3683.) Also, an affidavit submitted by Sewell recounted how yet another bottler told an independent supplier not to bother making an offer, for the bottlers *had* to buy from Southeastern *regardless* of price. (Record 1961.) The standard 5-year, 80% requirements contract to which all agreed *explicitly* provided as much. (App. 39a.)

[3] Indeed, the evidence was compelling—one independent consultant engaged by a large bottler to ascertain why the bottler was *losing* market share found a 77% preference in favor of the type of bottle made by Sewell and other independent manufacturers. (Record 3592-611.) It is hardly surprising that *before* the exclusive horizontal buying agreement was implemented, bottlers in exercising individual freedom of choice consistently bought the preferred Sewell-type bottle, thereby genuinely serving their own customers' wants and needs.

[4] On the evidence, this flatly disregards one large bottler's own independent consultant's study that the bottler, in fact, *was* losing market share because it was using the Southeastern bottle. (Record 3592-611.)

Key Enterprises Court, however, held "the channeling of patient choice is sufficient to show injury to consumers" (*Key Enterprises*, 919 F.2d at 1559), consistent with this Court's teachings on non-monetary 'consumer choice" injury in *FTC v. Indiana Federation of Dentists*, 476 U.S. 447 (1986); *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985); *Associated General Contractors of Cal., Inc. v. California State Council of Carpenters*, 459 U.S. 519, 528 (1983) ("Coercive activity that prevents its victims from making free choices between market alternatives is inherently destructive of competitive conditions and may be condemned even without proof of its actual market effect.").

Disregarding consumer preference here, in the words of this Court in *Associated General Contractors*, was and is "inherently destructive of competitive conditions."

* * * *

In short, the Eleventh Circuit in *Key Enterprises* did not lose sight of the competitive process. The Court made no ultimate determination of whether the buyers were better off if the exclusionary practices were allowed to succeed. The Fourth Circuit here did just that, going so far as to affirm the district court's last-minute decision granting summary judgment shortly after a jury trial began. The district court and Fourth Circuit took it upon themselves to conclude that the consumer in the Southeastern area is better off by buying the type of product forced on him. At a minimum, that is for a jury to decide.[5]

---

[5] Much of Respondents' presentation is comprised of disparaging references to Sewell—apparently intended to show Sewell to be an unworthy Petitioner—which do not warrant textual reply in this Brief. Sewell, for example, is portrayed as a monolithic ogre, charging higher and higher prices and reaping unwarranted high profits before Southeastern came into existence. (Brief in Opp. 2.) This is not only irrelevant—Sewell's management was obligated to maximize its shareholders' investment as much as, say, Coca-Cola's management—but deceptive. In accordance with individual contracts, prices were adjusted upward *and* downward to reflect actual, demon-

CONCLUSION

As a seller, Sewell respectfully asks the Court to delineate the fundamental ground rules for exclusive horizontal buying conduct. If Sewell is correct in distinguishing the buying agreement from the joint production venture, *per se* rules would—and should—apply. The unerring truth is that the buying agreement was implemented to make sure that Sewell (and other independent suppliers) cannot compete. That is exactly what *per se* rules condemn. But even if the buying agreement is not *per se* unlawful, as in *Key Enterprises*, Sewell was entitled to a Rule of Reason trial.

For the reasons set forth in the Petition and in this Reply, a Writ of Certiorari should be granted.

Respectfully submitted,

WILLIAM L. RIKARD, ESQ.
PARKER, POE, THOMPSON,
GAGE & PRESTON
2600 Charlotte Plaza
Charlotte, NC 28244
(704) 372-9000

ROBERT L. HOEGLE, ESQ.
Counsel of Record
PETER ARON, ESQ.
OLWINE, CONNELLY, CHASE,
O'DONNELL & WEYHER
750 Seventh Avenue
New York, New York 10019
(212) 261-8000

February 12, 1991

---

strated changes in manufacturing costs. (Record 1972-75, 1987-90, 2028-57.)

Respondents likewise portray as sinister Sewell's efforts to offer lower prices to bottlers to keep them from forming Southeastern (Brief in Opp. 7-8), when that is nothing but competition.

In a different vein, Respondents attack the efforts of Sewell and its counsel to achieve a settlement of the dispute, efforts which were entirely proper and professional, and consistent, of course, with public policy in favor of settlement. It seems rather desperate, we must suggest, to attempt to so divert the genuine issues presented on this Petition by resort to such an unseemly attack.